(23,793)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1913.

## No. 642.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, APPELLANT,

vs.

ROBERT M. DITTEY, FRANK E. MUNN, AND CHRISTIAN PABST, AS THE TAX COMMISSION OF OHIO, AND THE TAX COMMISSION OF OHIO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

INDEX.


| | Original. | Print |
|---|---|---|
| Caption | 1 | 1 |
| Bill of complaint | 1 | 1 |
| Motion for restraining order | 18 | 11 |
| Order granting temporary restraining order | 19 | 12 |
| Bond for restraining order | 20 | 13 |
| Temporary restraining order | 22 | 14 |
| Subpœna | 23 | 14 |
| Temporary restraining order returned | 23 | 15 |
| Subpœna returned | 25 | 16 |
| Order for temporary restraining order to continue in force | 26 | 17 |
| Order granting leave to file demurrer | 27 | 17 |
| Demurrer | 27 | 18 |


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| | Original. | Print |
|---|---|---|
| Order setting case for hearing November 26, 1912 | 29 | 19 |
| Opinion | 31 | 20 |
| Order denying injunction, etc | 50 | 32 |
| Petition for appeal | 51 | 33 |
| Order allowing appeal | 52 | 34 |
| Assignment of errors | 52 | 35 |
| Bond on appeal | 56 | 37 |
| Praecipe for record | 58 | 38 |
| Clerk's certificate | 59 | 39 |
| Citation and service | 60 | 39 |

1 At a Stated Term of the District Court of the United States within and for the Sixth Judicial Circuit and Eastern Division of the Southern District of Ohio, Begun and Held at the Court Rooms in the City of Columbus, on the First Tuesday of December, Being also the Third Day of That Month, in the Year of Our Lord One Thousand Nine Hundred and Twelve, and in the One Hundred and Thirty-seventh Year of the Independence of the United States of America.

Present: The Hon. John E. Sater, District Judge.
Among the proceedings had were the following, towit:

No. 1598.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

R. M. DITTEY, F. E. MUNN, and CHR. PABST, as The Tax Commission of Ohio, and THE TAX COMMISSION OF OHIO, Defendants.

Be it remembered that heretofore towit, on the 4th day of November, A. D. 1911, came the Plaintiff, and filed in the Clerk's Office of said Court, its certain Bill of Complaint in this cause, against said defendants, which said Bill of Complaint is clothed in the words and figures following, towit:

*Bill of Complaint.*

In the United States Circuit Court for the Southern District of Ohio, Eastern Division. In Equity.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

ROBERT M. DITTEY, FRANK E. MUNN, and CHRISTIAN PABST, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States, in and for the Southern District of Ohio, Eastern Division, in Chancery Sitting:

The Ohio River and Western Railway Company, a corporation duly organized under the laws of the State of Ohio, having
2 its principal office and place of business in the County of Monroe and State of Ohio, and a resident and citizen of the State of Ohio, brings this, its bill, against R. M. Dittey, F. F. Munn, and Chr. Pabst, as The Tax Commission of Ohio, and The Tax

Commission of Ohio, all of whom are residents of the City of Columbus, Franklin County, Ohio, and are citizens and inhabitants of said City of Columbus, Franklin County, Ohio, and of said Southern District of Ohio, Eastern Division.

And thereupon the plaintiff complains and says:

1. The controversy herein arises under the Constitution of the United States. The amount in dispute and involved herein, exclusive of interest and costs, exceeds the sum or value of two thousand dollars.

2. The Ohio River and Western Railway Company is and for several years last past has been a corporation duly formed and existing as such under the laws of Ohio, for the purpose of owning and operating a narrow gauge railroad, extending from Zanesville in Muskingum County, Ohio, through a portion of said Muskingum County and a portion of Noble and Guernsey Counties, Ohio, and into Belmont County, Ohio, terminating at the city of Bellaire, in all a distance of about one hundred and eleven miles. The plaintiff owns and operates, and during said period has owned and operated, said railroad and for that purpose owns and uses the necessary rolling stock, fixtures, and appurtenances, and is and has been engaged in the transportation of persons and property, as a common carrier, and is engaged in interstate and foreign commerce and in intrastate commerce; but the amount of interstate traffic moved by said plaintiff and its gross earnings therefrom are and will continue to be relatively small, and the gross earnings therefrom, together with all earnings derived from business done for the federal
3 government, do not constitute more than about ten per cent of the plaintiff's gross earnings.

3. The Tax Commission of Ohio is a Commission created by an Act of the General Assembly of Ohio, enacted May tenth, 1910, entitled: "An Act To create a tax commission, define its powers and duties," etc. (101 Ohio Laws, 399); and also an Act of the General Assembly of Ohio, enacted the thirty-first day of May, 1911, entitled: "An Act To repeal sections 5446 to 5542-8, inclusive, and 5542-10 to 5542-24, inclusive, of the General Code, as enacted May 10, 1910, (101 Ohio L., 399), relating to the tax commission of Ohio and to further define its powers and duties."—which said Acts clothe said Commission with certain powers and impose upon it certain duties.

4. Said Act of May thirty-first, 1911, among other things, defines a railroad company as—

"any person or persons, firm or firms, copartnership or voluntary "association, joint stock association, company or corporation, "wherever organized or incorporated. * * *
* * * "When engaged in the business of operating a railroad, "either wholly or partially within this State, on rights-of-way as- "quired and held exclusively by such company, or otherwise."

5. Sections 81 and 83 of said Act require each railroad company annually, on or before the first day of September, under oath, to make and file with said Tax Commission, a statement setting forth, among other things, the entire gross earnings, includi[illegible] all

sums earned or charged, whether actually received or not, for the year ending on the thirtieth day of June next preceding, from whatever source derived, for business done within this state, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government, and also the total gross earnings of such company for such period in this state for business done within this state.

6. Section 88 of said Act provides that on the first Monday of October, said Commission shall ascertain and determine the gross earnings of each railroad company whose line is wholly or partially within this state, for the year ending on the thirtieth day of June next preceding, excluding therefrom all earnings derived from interstate business or business done for the federal government, and that the amount so ascertained by said Commission shall be the gross earnings of such railroad company for such year.

7. Section 93 of said Act provides that on the first Monday of November, said Commission shall certify to the Auditor of State the amount of gross earnings so determined of each railroad company, for the year ending on the thirtieth day of June next preceding.

8. Section 97 of said Act provides that in the month of November, the Auditor of State shall charge for collection from each railroad company a sum in the nature of an excise tax for the privilege of carrying on its intrastate business, to be computed on the amount so fixed and reported to him by said Commission as the gross earnings of such company on its intrastate business for the year covered by its annual report to said Commission, as required by said Act, by taking four per cent. of all such gross earnings, which said tax shall not be less than ten dollars in any case.

9. Section 99 provides that the Auditor of State shall then prepare proper duplicates and reports and certify them to the Treasurer of State for collection, and that upon the receipt of such duplicates the Treasurer shall notify each company charged with taxes of the amount due from it.

10. Section 102 of said Act provides that if any public utility, including railroads, fails or refuses to pay, on or before the fifteenth day of December, the tax assessed against it, the Treasurer of State shall certify the same to the Auditor of State, who shall add to the tax a penalty of fifteen per cent thereon and prepare proper duplicates of such taxes and penalties and certify them to the Treasurer of State for collection, and said Treasurer of State, thirty days after he receives the same, shall certify to said Commission a list of such public utilities and corporations as have failed to pay such taxes and penalties thereon.

11. Section 103 of said Act provides that such taxes and penalties may be recovered by an action in the name of the State, which may be brought in the Court of Common Pleas of Franklin County or of any county in which the corporation has an office or place of business, or in which the public utility is doing business; that the Attorney General shall institute such an action in any of such courts as said Commission may direct, and that in any such action it shall

be sufficient to allege that the tax or penalty sought to be recovered stands charged on the delinquent duplicate of the Treasurer of State, and that the same has been unpaid for a period of thirty days after having been placed thereon.

12. Said Act further provides that said excise tax shall be paid into and become a part of the general revenue fund of the State.

13. Said Act further provides that these taxes and penalties required to be paid by it shall be the first and best lien on all the property of the public utility or corporation.

14. Section 120 of said Act provides that if a corporation fails to pay said tax for ninety days after the time prescribed in said Act as aforesaid for paying the same, the said Commission shall certify such fact to the Secretary of State, and the Secretary of State shall thereupon cancel the articles of incorporation of
6 such corporation, if it be organized under the laws of Ohio, by proper entry upon the margin of the record thereof, and that thereupon all the powers, privileges and franchises conferred upon such corporation by such articles of incorporation shall cease and determine; and that the Secretary of State shall immediately notify such corporation of the action taken by him.

15. Section 121 of said Act provides that any person or persons who shall exercise or attempt to exercise any powers, privileges or franchises under the articles of incorporation after the same are cancelled, shall be fined not less than one hundred dollars nor more than one thousand dollars.

16. Section 123 of said Act provides that in addition to all other remedies, the Attorney General shall, upon the request of said Commission, whenever said tax or said penalty shall have remained unpaid for a period of ninety days, apply to the Common Pleas Court of Franklin County, Ohio, or of any county of the State where said public utility or corporation is located, for an injunction to restrain the same from the transaction of any business within this State until the payment of such tax or penalty, and that if it be made to appear to the Court, upon hearing thereof, that such public utility has failed or neglected for ninety days to pay said tax or penalty, such Court of Common Pleas shall grant and issue such injunction.

17. Section 33 of said Act provides that no injunction shall issue, suspending or staying any order, determination or direction of the Commission, or any action of the Auditor of State, Treasurer of State, or Attorney General, required by law to be taken in pursuance of any such order, determination or direction; but nothing herein shall affect any right or defense in any action to collect any tax or penalty.

7 18. Prior to September first, 1911, the plaintiff, under express protest and solely to avoid the pains penalties and forfeitures hereinafter described, and not admitting or intending to admit the validity of said tax, but objecting to and protesting against the same, filed with said Commission, upon its demand therefor under the pains and penalties of said Act, a statement showing, among other things, the entire gross earnings of the plaintiff, including

all sums earned or charged, whether actually received or not, for the year ending June 30th, 1911, from whatever source derived, for business done within this State, excluding therefrom all earnings derived from interstate business or business done for the federal government, said entire gross earnings being the sum of one hundred and sixty six thousand, three hundred and forty dollars ($166,340).

19. On October 2nd, 1911, being the first Monday of October, said Commission ascertained and determined the gross earnings of the plaintiff. Plaintiff does not know and has not the means of knowing the exact amount so ascertained and determined by said Commission, because it is claimed by said Commission that said sum returned by plaintiff, as aforesaid, is too small, and that certain deductions have been improperly made from the gross receipts of plaintiff from every source, but said sum so ascertained and determined by said Commission is not less than said sum returned by plaintiff as aforesaid.

20. On the first Monday of November, 1911, to-wit, November sixth, 1911, said Commission threatens to and will, unless restrained by the order of this Court, certify to the Auditor of State the amount of the gross earnings of the plaintiff so determined by it as aforesaid, which said sum will be equal to or greater than the amount returned by plaintiff as aforesaid, and said Auditor of State will thereupon forthwith charge for collection from plaintiff, a sum pur-
8 porting to be in the nature of an excise tax for the privilege of carrying on its intrastate business, which sum will be four per cent. of said amount so certified by said Commission, and will be at least four per cent. of said sum of one hundred and sixty six thousand, three hundred and forty dollars ($166,340), to-wit: sixty six hundred and fifty three dollars and sixty cents, ($6,653.50), and said Auditor of State will thereupon forthwith prepare deplicates and report containing said sum charged against plaintiff, and will certify them to the Treasurer of State for collection, and said Commission will certify such default to the Sec'y of State who will immediately cancel its articles.

21. The capital of the plaintiff has been and is practically without exception all invested in the said railroad owned and operated by it as aforesaid which said investment was a reasonable and proper one.

22. Due care and prudence have been exercised in the construction equipment, maintenance and operation of said railroad property and in the conduct of its business, nor has the same been characterised by waste or extravagance. On the contrary, the greatest economy has been and is being practiced in a bona fide effort to make said railroad yield a fair return upon the investment therein. Many of its officers have served without salary, and all expenses have been kept at a minimum. All practical means have been exhausted to increase or render more remunerative plaintiff's freight and passenger traffic, or either of them.

23. The volume of plaintiff's passenger traffic exceeds and always has exceeded the volume of its freight traffic, and the revenue derived from its passenger traffic exceeds and always has exceeded that from

its freight traffic. While there has been a gradual increase in the number of passengers carried from year to year, the benefit of this increase has been practically destroyed by the enactment by
9 the State of Ohio of the so-called two cent passenger fare law, which said law the plaintiff, though believing the same to be confiscatory, has obeyed for fear of the enormous pains and penalties imposed for its violation.

24. Notwithstanding the efforts of the plaintiff, it has never been able to earn and is not now able to earn from its interstate or its intrastate business, or both combined, after paying necessary and proper expenses, including taxes other than said excise tax, a return on the investment in its said railroad, equal to or as much as the current rate of return on legitimate and high grade investments at all times readily available on the market. Nor have its intrastate earnings, after deducting expenses properly attributable to intrastate operations, (including taxes other than said excise tax) been sufficient to yield a return on that portion of said investment properly attributable to intrastate operations, equal to or as much as the current rate of return on legitimate high grade investments at all times readily available on the market as aforesaid; and said conditions will continue to exist and will exist during the year for which said excise tax is intended to cover.

25. Said excise tax, and every part thereof, exceeds the reasonable annual value of the privilege of carrying on plaintiff's intrastate business; and said excise tax for the current year, amounting to at least sixty six hundred and fifty three dollars and sixty cents ($6,653.60), as aforesaid, is wholly, and as to every part thereof, in excess of the reasonable annual value of carrying on plaintiff's intrastate business during said current year. Said tax is, therefore, invalid and void, and in violation of the Constitution of
10 Ohio, and particularly the preamble thereof, and Sections 2 and 19 of the Bill of Rights thereof, and in violation of the Fourteenth Amendment to the Constitution of the United States.

26. Plaintiff further says that said Act of May thirty-first, 1911, attempts to classify the corporations carrying on business in the State of Ohio for purposes of raising general revenue by an excise tax imposed for the privilege of carrying on intrastate business; that said Act provides that an excise tax for such privilege shall be imposed upon all public utilities, as defined by said Act.

27. In Section 39 of said Act, the term "public utility," as used therein, is defined to include corporations, firms and individuals engaged in certain lines of business affected with a public interest, including railroads; but said definition does not include or purport to include all kinds of business affected with a public interest carrying on intrastate business in the State of Ohio, nor all real public utilities so carrying on such business therein. The intrastate business of many of said excluded public utilities is and has been and will be highly remunerative, and the privilege of carrying the same on of equal or greater value than the privileges sought to be taxed by said excise tax. The privilege of carrying on their intrastate business by said excluded classes of public utilities is not taxed by said Act,

or by any other law whatsoever. The public utilities upon which said excise tax is imposed by said Act must compete and continue to compete with said excluded classes of public utilities in the money markets, for the securing of funds necessary to the establishment, betterment, and maintenance of their respective lines of business, and by reason of the arbitrary and discriminatory classification aforesaid, under which certain public utilities are subject to
11 said excise tax and others are excluded and free therefrom, those utilities subject thereto, including railroad companies, are placed at a great and constant disadvantage in perfecting and maintaining their several financial arrangements, and will continue to be.

28. Plaintiff further says that said classification is arbitrary, unreasonable, and unduly and injustly discriminatory against all of the corporations included in said Section 39 of said Act, and particularly railroad companies, and is unjustly and unduly unequal in its operation, and by reason thereof said classification and said excise tax based thereon are invalid and in violation of the Constitution of Ohio and particularly the preamble thereof, and Sections 2 and 19 of the Bill of Rights thereof, and also of the Fourteenth Amendment to the Constitution of the United States.

29. Plaintiff further says that said Act makes a sub-classification of the public utilities enumerated in Section 39 thereof, as aforesaid, by which it imposes an excise tax upon railroad companies and pipe line companies, computed by taking four per cent. of their intrastate earnings, and imposes upon all other public utilities mentioned in said Section 39 a similar excise tax computed by taking one and two-tenths (1.2 per cent. of their gross receipts upon intrastate business, excepting express and telephone companies, as to which the tax is computed by taking two (2) per cent. of such gross earnings; that said sub-classification is unreasonable, arbitrary, unjust, and unjustly and unduly discriminatory as against railroad companies, and is not based upon nor in proportion to their several abilities to pay said tax or the respective values of the privileges taxed; that the value of the privileges upon which the 1.2 and 2 per cent. taxes are imposed are and have been and will be equal to or greater than the value of the privileges upon which four per cent. tax is imposed, and are not otherwise taxed by said Act or
12 by any other law whatsoever. The pipe line companies and railroad companies, including the plaintiff, upon which said four per cent. tax is imposed by said Act, must compete and continue to compete with said utilities upon which the 1.2 and 2 per cent. taxes are imposed, in the money markets, for the securing of funds necessary to the establishment, betterment, and maintenance of their respective properties. And by reason of the arbitrary and discriminatory sub-classification aforesaid, said utilities subject to the four per cent. tax, including the plaintiff, are placed at a great and constant disadvantage and subjected to an unjust and unreasonable discrimination in perfecting and maintaining their several financial arrangements. Said railroad companies also in many instances

are forced to compete for traffic with interurban railroads, upon which a tax of but 1.2 per cent. is imposed, and by reason of said sub-classification said interurban railroads are placed in a position of unfair and unreasonable advantage over said railroads, and said railroads and particularly the plaintiff, are subjected to an unreasonable and unjust discrimination against them and in favor of said interurban railroads. Said sub-classification is unjustly and unduly unequal in its operation, and by reason thereof said sub-classification and said four per cent. excise tax based thereon are invalid and in violation of the Constitution of Ohio and particularly the preamble thereof, and Sections 2 and 19 of the Bill of Rights thereof, and also of the Fourteenth Amendment to the Constitution of the United States.

30. Plaintiff further says that the percentage of gross earnings from intrastate business to total gross earnings varies very widely among the railroads operating in said State, and will continue
13 to do so; that in the case of the small local roads, to which class plaintiff belongs, this percentage is high, and the four per cent. tax represents a much greater relative deduction from their total gross earnings than is true in the case of the large interstate railroads; that the cost of conducting local and intrastate business is much greater than the cost of conducting through and interstate business, and such local business is therefore much less profitable.

31. Plaintiff further says that the value of the privilege of carrying on their intrastate business is of much less value to said small local roads, and particularly to the plaintiff, than is the value of conducting their intrastate business to the large interstate lines; that the aforesaid differences in cost and in value are and have been matters of common knowledge and general recognition; that as between the several railroads operating in Ohio, said four per cent. tax is grossly unjust and unreasonable and discriminatory as against the plaintiff and other roads similarly situated, and places them at a serious disadvantage in competing with the roads upon which said tax bears so much less heavily, as aforesaid.

32. Plaintiff further says that said four per cent. tax is arbitrary, unreasonable, and unduly and unjustly discriminatory against the plaintiff, and grossly unequal in its operation as against the plaintiff; that by reason thereof said tax is invalid and in violation of the Constitution of Ohio and particularly the preamble thereof, and Sections 2 and 19 of the Bill of Rights thereof, and also of the Fourteenth Amendment to the Constitution of the United States.

33. Plaintiff further says that for several years prior to the passage of the Act of May tenth, 1910, aforesaid, the State had at-
14 tempted to levy an excise tax for the privilege of carrying on their respective lines of business within this State, computed by taking one per cent. upon all their gross earnings of the several public utilities names in Section 39 of said Act of May thirty-first, 1911; that some of said public utilities, principally railroads and pipe line companies, were engaged in interstate commerce, and it appearing that said one per cent. tax was therefore invalid,

as in violation of the commerce clause in the Federal Constitution, said Acts of May tenth, 1910, and May thirty-first, 1911, were enacted, by which it was attempted as to railroads and pipe line companies to increase the percentage to four per cent. and limit its application nominally to intrastate commerce;—the percentage as to other utilities being left practically unchanged; that said increase of said tax to four per cent. was intended to be and was and is an attempt to discriminate against utilities engaged in interstate commerce and to levy a tax upon interstate commerce and to regulate the same, and that by reason thereof said four per cent. tax is invalid and in violation of the commerce clause of the Federal Constitution.

34. Plaintiff further says that under Section 47 of said Act of May thirty-first, 1911, said Commission is required to ascertain and assess at its true value in money, all the property in this State of each public utility subject to the Act, including railroads; that by reason thereof said Commission assessed all the property in this State of the plaintiff; that by reason thereof said four per cent. tax is in reality a double tax on plaintiff's property, and is in effect and in fact a property tax, lacking uniformity and equality, and is unequal and unjust and in violation of the State and Federal Constitutions.

35. Plaintiff has asked said Commission for relief, but without effect.

36. Plaintiff further says that by reason of the premises the tax which will be assessed against plaintiff, unless the Commission is restrained from certifying the amount determined by it as plaintiff's gross receipts as aforesaid, is unconstitutional, invalid and void; that nevertheless, if said tax is so certified, plaintiff will be compelled to pay the same or else incur the pains and penalties prescribed in said Act as aforesaid, and if it does not pay said tax then its articles of incorporation will be cancelled and its corporate franchises destroyed and its right to be a corporation terminated, and it will be prevented from further serving the public as a common carrier in either intrastate or interstate commerce, and its property will be wrongfully seized for the payment of said tax; and plaintiff's real estate will be subjected to a lien for the amount of said tax and the penalty thereon, and the plaintiff's title thereto will be clouded thereby, and plaintiff will be subjected to numerous harrassing and vexatious suits.

37. Plaintiff further says that it will be impossible to secure an adjudication as to the validity of said tax within the period named in Section 120 of said Act, by interposing such invalidity as a defense to any suit that might be brought for its collection or enforcement; that the purpose and necessary effect of the several provisions of said Act is to compel the plaintiff to pay said illegal and void tax or to forfeit all its charter rights and franchises and to have its corporate existence destroyed, and this is its only opportunity for injunction relief.

38. Plaintiff further says that Section numbered 33 of said Act attempts to prevent any judicial examination of the validity of said Act or any judicial construction of its meaning.

16 39. Plaintiff further says that by reason of the premises said excise tax is confiscatory of its property, and if enforced against plaintiff will take its property without due process of law, and will deny to it the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

40. Plaintiff further says that the damages it will suffer in the premises are irreparable, and that it has no adequate remedy at law.

All the matters and things in this bill of complaint set forth as to the actions, doings and intentions of the defendants are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of the plaintiff.

In consideration whereof and for as much as the plaintiff is remediless in the premises at and by the strict rules of common law, and can only have relief in a court of equity where matters of this nature are properly cognizable and relievable, plaintiff prays your Honors to grant unto it a writ of subpœna, to be directed to each of the defendants herein, commanding them, in conformity with the practice of this Honorable Court, to appear herein and answer this bill of complaint, (but not under oath, an answer under oath being expressly waived), and also that the defendants and each of them, their servants, agents and employés, be temporarily enjoined from certifying to the Auditor of State of Ohio, said sum of one hundred and sixty six thousand, three hundred and forty dollars ($166,340), or any part thereof, or any other sum or sums whatever, as the amount of the gross earnings of the plaintiff for the year ending on the thirtieth day of June, 1911, for business done within this State, and from making any certification whatsoever to said Auditor of State for or in connection with or as a basis for any excise

17 tax upon the plaintiff, for the privilege of carrying on its intrastate business, and from taking or authorizing any action against plaintiff in connection with said tax; and that upon final hearing, said injunction be made perpetual and permanent and said tax decreed to be void; that a temporary restraining order issue forthwith, and for all such other relief as plaintiff may in equity be entitled to, and as to this Honorable Court may seem meet; and plaintiff will ever pray.

ROB'T J. KING,
*Solicitor for Plaintiff.*

STATE OF OHIO,
*Franklin County, ss:*

W. C. Mooney, being duly sworn, deposes and says that he is the treasurer of the plaintiff, The Ohio River and Western Railway Company, which is a corporation, and its officer and agent duly authorized in the premises; that he has read the foregoing bill of complaint, and that the facts stated therein are true, except such as are therein said to be upon information and belief, and as to such facts affiant verily believes them to be true.

W. C. MOONEY.

Sworn to before me and subscribed in my presence, this 4" day of November, 1911.

[SEAL.] C. P. WHITE, JR.,
*Deputy Clerk, U. S. Circuit Court, S. D. O.*

Endorsed: Let restraining order issue until 10 A. M. Nov. 11, 1911, at which time cause to be heard on application for temporary injunction; but if for cause case is not heard at above named hour restraining order to continue in force until ruling of court on application for temporary injunction. Bond to be given in sum of $8,000.00. Nov. 4, 1911. J. E. Sater, J.

18 And afterwards, to wit: on the 4th day of November, A. D. 1911, came the Plaintiff, by its Attorneys, and filed in the Clerk's Office of said Court, its certain Motion in this cause, which said Motion is clothed in the words and figures following, to wit:

*Motion.*

In the United States Circuit Court for the Southern District of Ohio, Eastern Division. In Equity.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

ROBERT M. DITTEY, FRANK E. MUNN, and CHRISTIAN PABST, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

*Motion.*

Now comes the plaintiff and moves the Court for a temporary restraining order herein.

ROB'T J. KING,
*Solicitor for Plaintiff.*

19 And afterwards, to wit: on the 4th day of November A. D. 1911, an Entry was made upon the Journal of said Court in said cause, which said Entry is clothed in the words and figures following, to wit:

*Entry (Temporary Restraining Order Granted).*

In the United States Circuit Court for the Southern District of Ohio, Eastern Division. In Equity.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

R. M. DITTEY, F. E. MUNN and CHR. PABST, as The Tax Commission of Ohio, and THE TAX COMMISSION OF OHIO, Defendants.

*Journal Entry.*

This day this cause came on to be heard upon the application of the plaintiff for a temporary restraining order herein, the defendant having been duly notified of the application therefor, and was argued by counsel for plaintiff and defendants, on consideration whereof the court, being fully advised in the premises, finds that said temporary restraining order should be granted, as prayed for.

It is, therefore, ordered, adjudged and decreed that upon giving bond in the sum of $8,000.00, with surety approved by the Court, the defendants and each of them, their servants, agents and employés, be and they are hereby restrained until the further order of this Court as hereinafter stated, from certifying to the Auditor of State, the sum of one hundred and sixty six thousand, three hundred and forty dollars, or any part thereof, or any other sum or sums whatsoever, as the amount of gross earnings of the plaintiff for the year ending on the thirtieth day of June, 1911, for business done within this State; and from making any certification whatsoever to said Auditor for or in connection with or as a basis for any excise tax upon the plaintiff for the privilege of carrying on its intrastate business, and from taking or authorizing any action against plaintiff in connection with said tax. This order shall be in full force and effect until 10 A. M., Nov. 11, 1911, at which time this cause to be heard on application for temporary injunction; but if for cause case is not heard at above named hour this restraining order shall continue in force and effect until this court shall rule on application for temporary injunction.

And afterwards, to wit: on the 4th day of November, A. D. 1911, there was filed in the Clerk's Office of said Court a certain Bond on the Restraining Order in this cause, which said Bond is clothed in the words and figures following, to wit:

*Restraining Order Bond.*

THE UNITED STATES OF AMERICA,
*Southern District of Ohio, ss:*

Restraining Order Bond.

Know all men by these presents: that The Ohio River and Western Railway Company and W. C. Mooney — held and firmly bound unto Robert M. Dittey, Frank E. Munn and Christian Pabst as The Tax Commission of Ohio and The Tax Commission of Ohio in the sum of eight thousand dollars to the payment of which they bind themselves, heirs, executors and administrators firmly by these presents.

Sealed with our seals, and dated this 4th day of November, A. D. 1911.

The condition of the above obligation is such, that Whereas, The Ohio River and Western Railway Company a citizen of the
21 State of Ohio having filed on the Chancery side of the Circuit Court of the United States for the Southern District of Ohio, a Bill against the said Robert M. Dittey, Frank E. Munn and Christian Pabst as The Tax Commission of Ohio and The Tax Commission of Ohio and having obtained an allowance of a temporary restraining order, as prayed for in said Bill, from certifying to the Auditor of the State of Ohio, the sum of $166,340, or any part thereof or any other sum or sums whatsoever as the amount of the gross earnings of said Company for the year ending June 30, 1911 and from making any certification whatever to said auditor for or in connection with or as a basis for any excise tax on said Co. for the privilege of carrying on its intra-state business and from taking or authorizing any action against said Company in connection with said tax.

Now, if the said The Ohio River and Western Railway Company shall abide the decision of said Court and pay all moneys and costs which shall be adjudged against it in case the said restraining order shall be dissolved, then these presents shall be void, otherwise to remain in full force.

THE OHIO RIVER AND WESTERN
RAILWAY COMPANY, [SEAL.]
By W. C. MOONEY, *Its Treasurer.*
W. C. MOONEY. [SEAL.]

Signed and sealed in presence of
C. P. WHITE, JR.
A. M. SPARKS.

Approved,
J. E. SATER, *J.*

22 Thereupon there was issued out of the Clerk's Office of said Court, our certain Temporary Restraining Order in this cause, directed to the Marshal of said District and against said De-

fendant which said Temporary Restraining Order is clothed in the words and figures following, towit:

*Temporary Restraining Order.*

THE UNITED STATES OF AMERICA,
*Southern District of Ohio, Eastern Division, ss:*

The President of the United States of America to Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Greeting:

Whereas The Ohio River and Western Railway Company, a corporation, etc., citizen of the State of Ohio has filed on the Chancery side of the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio, a bill against Robert M. Dittey, Frank E. Munn and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, and has obtained an allowance for a Temporary Restraining Order, as prayed for in said Bill.

Now, Therefore, we having regard to the matters in said Bill contained, do hereby command and strictly enjoin you, the said Robert M. Dittey, Frank E. Munn and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, your servants, agents and employés, from certifying to the Auditor of State, the sum of one hundred and sixty six thousand, three hundred and forty dollars, or any part thereof, or any other sum or sums whatsoever, as the amount of gross earnings of the plaintiff for the year ending on the thirtieth day of June, 1911, for business done within this State; and from making any certification whatsoever to said
23 Auditor for or in connection with or as a basis for any excise tax upon the plaintiff for the privilege of carrying on its intrastate business, and from taking or authorizing any action against plaintiff in connection with said tax. This order shall be in full force and effect until 10 A. M. Nov. 11, 1911, at which time this cause to be heard on application for temporary injunction; but if for cause case is not heard at above named hour this restraining order shall continue in force and effect until this court shall rule on application for temporary injunctiin. Which commands and injunctions you are respectively required to observe and obey, until our said Circuit Court shall make further order in the premises.

Hereof fail not, under the penalty of the law thence ensuing.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 4th day of November, A. D. 1911, and in the 136" year of the Independence of the United States of America.

[SEAL.]

B. E. DILLEY,
*Clerk U. S. Circuit Court, S. D. O.,*
By C. P. WHITE, Jr., *Deputy.*

Thereupon there was issued out of the Clerk's Office of said Court, our certain Subpœna in this cause, directed to the Marshal of said District and against said defendant which said Subpœna is clothed in the words and figures following, towit:

*Subpœna.*

UNITED STATES OF AMERICA,
*Southern District of Ohio, Eastern Division, ss:*

24 The President of the United States of America to the Marshal of the Southern District of Ohio, Greeting:

You are hereby commanded to summon Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, citizens of and resident in the State of Ohio, if they be found in your District, to be and appear in the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio, aforesaid, at Columbus, on the first Monday in January next, to answer a certain Bill in Chancery, filed and exhibited in said Court, against them by The Ohio River and Western Railway Company, a corporation, etc., citizen of and resident in the State of Ohio.

Hereof you are not to fail under the penalty of the law thence ensuing.

And have you then and there this writ.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 4th day of November, A. D. 1911, and in the 136th year of the Independence of the United States of America.

Attest:

[SEAL.] B. E. DILLEY, *Clerk.*

*Memorandum.*

The said defendants are required to enter their appearance in this suit in the Clerk's Office of said Court on or before the first Monday of December, 1911, otherwise the said bill may be taken pro confesso.

B. E. DILLEY, *Clerk.*

25 And afterwards, towit: on the 9th day of November, A. D. 1911, came the Marshal of said District to whom the said writ was in form aforesaid directed and returned the same into the Clerk's Office of said Court with his proceedings endorsed thereon, clothed in the words and figures following, towit:

*Marshal's Return (Restraining Order).*

Received this writ at Columbus, Ohio, on November 6, 1911, and on the same day I served the within named Robert M. Dittey, Frank E. Munn and Christian Pabst, as the Tax Commission of Ohio, by delivering to each a true copy of this writ, with the endorsements thereon, at Columbus, Ohio, by handing same to each personally, at Columbus, Ohio.

And on November 6, 1911, I served the within named The Tax Commission of Ohio by delivering a true copy of this writ, with the endorsements thereon, to Robert M. Dittey, Chairman of said Commission, by handing same to him personally, at Columbus, Ohio.

EUGENE L. LEWIS,
*U. S. Marshal, S. D. O.,*
By O. V. SHILLING, *Deputy.*

Total Fees $9.20.

And afterwards, towit: on the 9th day of November, A. D. 1911, came the Marshal of said District to whom the said writ was in form aforesaid directed and returned the same into the Clerk's Office of said Court with his proceedings endorsed thereon, clothed in the words and figures following, towit:

*Marshal's Return (Subpœna.)*

Received This Writ on the 6th day of November, A. D. 1911, and on the 6th day of November, A. D. 1911, I served the within named Robert M. Dittey, Frank E. Munn and Christian Pabst, as The Tax Commission of Ohio, by delivering a true copy of this writ,
20 with the endorsements thereon, to each of them, by handing said copy to each personally, at Columbus, Ohio. And on the 6th day of November, A. D. 1911, I served the within named The Tax Commission of Ohio, by delivering a true copy of this writ, with the endorsements thereon, to Frank M. Dittey Chairman of said Commission, by handing said copy to him personally, at Columbus, Ohio.

EUGENE L. LEWIS, *Marshal,*
By O. V. SHILLING, *Deputy.*

Fees: $9.32.

And afterwards, towit: on the 11th day of November, A. D. 1911, an Entry was made upon the Journal of said Court, in said Cause, which said Entry is clothed in the words and figures following, towit:

*Entry (Restraining Order to Continue in Force).*

In the United States Circuit Court for the Southern District of Ohio, Eastern Division. In Equity.

No. —.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, Plaintiff,
vs.
ROBERT M. DITTEY, FRANK E. MUNN, and CHRISTIAN PABST, as THE Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

*Journal Entry.*

For cause duly shown, the plaintiff's application for a temporary injunction herein is not heard at ten A. M., November eleventh, 1911, accordingly the restraining order heretofore issued herein continues in force and effect until this Court shall hear and rule upon such application for a temporary injunction.

27 And afterwards, towit: on the 23rd day of July, A. D. 1912, an Entry was made upon the Journal of said Court, in said cause, which said Entry is clothed in the words and figures following, towit:

*Entry (Leave to File Demurrer).*

No. 1593.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, Plaintiff,
vs.
ROBERT M. DITTEY, FRANK E. MUNN, and CHRISTIAN PABST, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Entry.

Upon application and for good cause shown leave is granted the Defendants to file their demurrer in this cause, and same is accordingly filed.

And afterwards, towit: on the 23rd day of July, A. D. 1912, came the Defendants, by their Attorneys and filed in the Clerk's Office of said Court, their certain Demurrer in this cause, which said Demurrer is clothed in the words and figures following, towit:

*Demurrer.*

In the District Court of the United States, Southern District of Ohio, Eastern Division.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

ROBERT M. DITTEY, FRANK E. MUNN, and CHRISTIAN PABST, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Demurrer of the Above-named Defendants, Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio to the Bill of Complaint of the Above-named Plaintiff.

The defendants by protestation not confessing or acknowledging all or any of the matters of things in said Bill of Complaint contained to be true, in such manner and form as the same are therein set forth and alleged, do demur to the said Bill and to each and every paragraph thereof. And for cause of demurrer show that it appears by the plaintiff's own showing by the said Bill that
28 it is not entitled to the relief prayed by the Bill against these defendants.

Wherefore, and for divers other causes of demurrer appearing from said Bill, these defendants do demur thereto, and pray the judgment of this Honorable Court whether they shall be compelled to make any answer to said Bill, and they humbly pray to be hence dismissed with the reasonable costs in this behalf sustained.

TIMOTHY S. HOGAN,
*Attorney General of Ohio, Solicitor for the Defendants, State House, Columbus, Ohio.*

CLARENCE D. LAYLIN,
*Of Counsel.*

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

TIMOTHY S. HOGAN,
*Attorney General of Ohio, Solicitor for the Defendants.*

STATE OF OHIO,
*Franklin County, ss:*

Robert M. Dittey, being duly sworn, deposes and says that he is a member of and Chairman of The Tax Commission of Ohio, and is one of the above-named defendants, and that the foregoing demurrer is not interposed for delay.

ROBERT M. DITTEY.

Sworn to before me and subscribed in my presence this 20th day of July, A. D. 1912.

[SEAL.] A. J. SMART,
*Notary Public Within and for Franklin County, Ohio.*

29 And afterwards, towit: on the 5th day of October, A. D. 1912, an Entry was made upon the Journal of said Court, in said cause, which said Entry is clothed in the words and figures following, towit:

*Entry (Case Set for Hearing Nov. 26, 1912).*

United States District Court, Southern District of Ohio, Eastern Division.

THE OHIO & WESTERN RAILWAY COMPANY, Complainant,
vs.
THE TAX COMMISSION OF OHIO, Defendant.

Order.

The complainant having filed in this Court its bill against the defendant and the members thereof, alleging that the Act under which said Tax Commission is operating is in certain respects unconstitutional and praying for a permanent injunction on the final hearing, and has also applied for an interlocutory injunction pending such hearing,

Now therefore, in pursuance of Section 266 of the Judicial Code of the United States, I do hereby call to my assistance, for the purpose of hearing and determining such application and such case on its merits, if counsel be ready thus to present the same, the Honorable John W. Warrington, United States Circuit Judge for the Sixth Judicial Circuit, and the Honorable William L. Day, United States District Judge for the Northern District of Ohio,—such hearing to be had in the Court Room in the Federal Building at Columbus, Ohio, on November twenty-sixth, 1912, at ten o'clock a. m.

It is further ordered that counsel for the respective par-
30 ties to such action be present, to present such case at the time above named on the application for an interlocutory injunction or on the merits, as they may elect and circumstances permit.

J. E. SATER,
*United States District Judge.*

And afterwards, towit: on the 15th day of February, A. D. 1913, there was filed in the Clerk's Office of said Court, a certain Opinion in this cause, which said Opinion is clothed in the words and figures following, towit:

31 *Opinion.*

United States District Court, Southern District of Ohio, Eastern Division.

No. 1593.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

ROBERT M. DITTEY, FRANK E. MUNN, and CHRISTIAN PABST, as The Tax Commission of Ohio, and the Tax Commission of Ohio, Defendants.

No. 1600.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

DAVID S. CREAMER, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

On Plaintiff's Application for Interlocutory Injunction and Defendants' Demurrer.

Before Warrington, Circuit Judge, and Sater and Day, District Judges.

PER CURIAM:

Jurisdiction of these cases is vested in this Court through the presence of certain federal questions, no matter how it shall be found necessary to decide them or whether to decide them at all. Siler v. Louisville & Nashville R. R. Co., 213 U. S., 175; Mich. Cent. R. R. Co. v. Vreeland, decided by U. S. Supreme Court, January 20, 1913; L. & N. R. Co. v. Siler, 186 Fed. Rep., 176.

32 The plaintiff in each of the cases is an Ohio corporation, whose line of road lies wholly within the state. In each case the plaintiff challenges the constitutionality of certain sections of the Act of May 31, 1911, 102 Ohio L., 224-260, creating a tax commission and providing for a system of taxation, and imposing a sum which the Act recites is in the nature of an excise tax upon the privilege of carrying on intra-state business. A restraining order having been granted in each case, the respective plaintiffs seek a temporary injunction. The defendants, who are certain state officers and members of the tax commission, demur to each of the bills. The cases are for hearing on the plaintiff's application for an interlocutory injunction and upon the demurrers of the defendants.

The law under consideration is a re-enactment of the Act of March 10, 1910. Its history is contained in the brief filed in behalf of the State, but its development need not be traced. The Act raises the rate of the so-called excise taxation on certain utilities, substitutes a tax commission for a board of appraisers and assessors, assembles the various tax laws of the state and incorporates them into one measure.

The term "public utility," as used in the Act and as defined in Sec. 39, means and embraces each corporation, company, firm, individual and association, their lessees, trustees, or receivers elected or appointed by any authority whatsoever, referred to in such section,—a railroad company being one of the many kinds of companies therein mentioned,—and includes also any plant or property owned or operated, or both, by any such companies, corporations, firms, individuals or associations. By the provisions of Sec. 40, any person or persons, firm or firms, copartnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, when engaged in the business of operating a railroad, either wholly or partially within the state, on rights of way acquired and held exclusively by such company, or otherwise, is a railroad company.

Section 42 defines the term "gross earnings"

"to mean and include the entire earnings for business done by any person or persons, firm or firms, copartnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, from the operation of any public utility, or incidental thereto, or in connection therewith. The gross earnings for business done by an incorporated company, engaged in the operation of a public utility, shall be held to mean and include the entire earnings for business done by such company under the exercise of its corporate powers, whether from the operation of the public utility itself or from any other business done whatsoever."

Sec. 83 requires a statement to be filed by each railroad company with the Tax Commission containing the entire gross earnings, including all sums earned or charged, whether actually received or not, for the year ending on the 30th day of June next preceding, from whatever source derived, for business done within the state, excluding therefrom, however, all earnings derived wholly from interstate business or business done for the federal government. The statement must also contain the total gross earnings of such company for such period from business done within the state. By the terms of Sec. 97, the Auditor of State in the month of November is required to charge for collection against each railroad company a sum in the nature of an excise tax for the privilege of carrying on its intra-state business. The amount so charged is four per cent, and is computed on the gross earnings, as fixed and reported to him by the Commission, of the company's intra-state business for the year covered by its annual report to such Commission, but the tax shall not be less than ten dollars in any case. The various public utilities

named in the Act are classified. The percentage charged for
34 collection as an excise tax for the privilege of carrying on intra-state business is the same as to all utilities falling within any given class, but varies as among different classes. The tax imposed for instance on railroad companies for such privilege is, as we have seen, four per cent. of the gross earnings of their intra-state business, to the exclusion of the earnings derived wholly from interstate business and business done for the federal government (Sections 46, 72, 83, 88, 93, 97), while that assessed for a like purpose against the similar earnings of street, suburban and interurban railroad companies is but 1.2%, and of express and telegraph companies 2%.

While the mere declaration of the General Assembly that the tax is an excise tax does not make it so, if it is apparent that it cannot be consistently so designated, nevertheless the declaration of the law-making body is entitled to much weight. Flint v. Stone Tracy Co., 220 U. S., 107; 145. In view of the decisions, state and federal, it is plain that the tax in question is an excise tax on the doing of corporate intra-state business, the gross intra-state business being the yardstick or measure of taxable value. Southern Gum Co. v. Laylin, 66 Ohio St., 578; State v. Ferris, 53 Ohio St., 314; Ashley v. Ryan, 49 Ohio St., 504; Western Union Telegraph Co. v. Mayer, 28 Ohio St., 521; Express Co. v. State, 55 Ohio St., 69; Adler v. Whitbeck, 44 Ohio St., 539; Thomas v. U. S., 192 U. S., 363; Cooley, Const. Lim., 6th ed., 608.

Each plaintiff contends that, because it is unable to earn upon its investment a reasonable profit attributable to intra-state business, it possesses no privilege worth four per cent. of its gross intra-state earnings and that such a tax is as to it both confiscatory and discriminatory. The Ohio River & Western Railway Company
35 alleges that a tax of four per cent. of its gross intra-state earnings is excessive, because, though carefully managed, it does not produce, without the imposition of such tax, a profit equal to the return upon high grade investments at all times available in the money market. The Marietta, Columbus & Cleveland Railway Company charges that it is actually operated at a loss. Are the plaintiffs or either of them for the reasons stated exempt from the excise tax in question? It was held in State v. Ferris, p. 341, and is conceded by the plaintiffs, that the first section of the fourteenth amendment to the constitution of the United States, which provides that no state shall "deny to any person within its jurisdiction the equal protection of its laws" is no broader than the second section of the Ohio bill of rights, and that therefore a statute relating to an excise tax authorized by the bill of rights would not conflict with such section of the constitution of the United States; but the plaintiffs, to maintain their contention, point to the following language in Southern Gum Co. v. Laylin, pp. 578, 594:

"But upon the power to tax privileges and franchises there is no express limitation in the constitution, but certain limitations upon that power must be implied from other provisions of the constitution, so as to make the whole instrument harmonious and con-

sistent throughout. The constitution was established to 'promote our common welfare.' Preamble to the Constitution. Government is instituted for the equal protection and benefit of the people. Section 2 of the Bill of Rights. Private property shall ever be held inviolate, but subservient to the public welfare. Section 19 of the Bill of Rights. These provisions of the constitution are implied limitations upon the power of taxation of privileges and franchises, and limit such taxation to the reasonable value of the privilege or franchise conferred originally, or to its continued value from year to year. Ashley v. Ryan, 49 Ohio St., 504, State v. Ferris, 53 Ohio St., 314, and Hagerty v. State, 55 Ohio St., 613, are examples of taxing the privilege or franchise conferred; while Telegraph Co. v. Mayer, 28 Ohio St., 521, and Express Co. v. State, 55 Ohio St., 69, are examples of taxing the continued value of the existing privilege or franchise from year to year.

36 These limitations prevent confiscation and oppression under the guise of taxation, and the power of such taxation cannot be extended beyond what is for the common or public welfare, and the equal protection and benefit of the people; but the ascertaining and fixing of such values rest largely in the General Assembly, but finally in the courts."

An examination of that case as reported, as well as of the original file papers, discloses that no contention was made and no issue tendered that the statute then under consideration imposed a tax beyond the reasonable value of the privilege or franchise originally conferred or its continued value from year to year, nor do any of the cases cited in the above quoted excerpt touch that question. The limitation thus said to be imposed by the state constitution on the legislative power to tax cannot, however, be safely treated as a dictum, for the reason that it is carried forward into the syllabus, which in Ohio states the law of the case. The Court dealt in that case with a general law and its operation on all corporations of given classes throughout the state, and not with its operation on specific financially weak corporations of any one of those classes. It did not consider the same question as is here presented, and we are constrained to believe that it did not mean to hold that the courts, as final arbiters, may overthrow a law which imposes a tax on privileges and franchises merely because in isolated cases such law imposes a hardship, but that it had reference to a law the effect of whose enforcement is to produce that result generally. This is made clear by the same court in State v. Guilbert, 70 Ohio St., 253, where it is said:

"We are of the opinion that an excise tax which operates uniformly throughout the state and applies equally to all the subjects embraced within its terms, cannot be said to deprive any of the equal protection of the law, or in any manner to violate the bill of rights, or any section of the constitution."

The earlier case of Western Union Telegraph Co. v. Mayer, 28 Ohio St., 521, is also instructive. A law of uniform operation,

37 which imposed an excise tax at a rate equal to that on property, on the gross receipts of foreign express and telegraph companies doing business in Ohio and prohibited, under heavy pen-

alties, any person from acting as agent of or transacting any business for any company that defaulted in the payment of such tax, was alleged to be violative of both the state and federal constitution. The tax was a charge on the privilege of such corporations exercising their franchises and powers within the state until the tax, interest and penalties thereon were fully paid. It was computed on the gross receipts arising manifestly not only from distinctively intra-state business, but from business which began elsewhere and terminated within the state, or had its inception in the state and terminated beyond its limits. Thus reckoned, the amount was 3.34% of such receipts, but if restricted as it should have been to the purely intra-state business, it equalled 31.2% of the total receipts from that source, or 93.6% of such receipts not absorbed by current expenses. It was charged that the tax was oppressive and unjust in its operation, but the tax was upheld, it being stated in the opinion regarding its provisions that—

"They are the conditions upon which corporations named in the act are allowed to do business within the state. Whether this tax is warranted by a wise public policy, or whether it is too onerous, are questions for the legislature and not for the courts. The burden is the price paid for transacting their business within the state. Any regulations imposed on such corporations, not amounting to a regulation of commerce, nor a tax on the property of the corporation within the state, imposed as a compensation to be paid to the state for the privilege of doing business within its territory, is, we think, within the legislative power of the general assembly. The unbroken current of judicial authority is in support of such power in the state, and in our opinion public policy demands its exercise."

The Court, it is true, was speaking of a law affecting foreign corporations only which could exercise none of their powers or franchises within the state, save through comity or under legislative consent, and which the court found might have been excluded
38 from the state altogether, with which theory we have nothing to do. But it is also true that it recognized the power to raise the necessary funds to defray the legitimate expenses of government by modes other than an ad valorem system of taxation on all property in the state and the legislative power to create domestic corporations and prescribe the terms upon which they, as well as foreign corporations, might exercise their franchises. The right to extend the tax to domestic corporations undoubtedly existed, as was later held in the Southern Gum Company case, but the legislature did not see fit to embrace such corporations within the law. It would therefore seem to follow that the language quoted is applicable to domestic as well as foreign corporations and that a law which, being of uniform operation, although it levied a charge almost equal to the entire net and distinctively intra-state profits of an individual corporation of a given class, is not, on that account, repugnant to any constitutional provision, state or federal.

Some assistance is derived from Adler v. Whitbeck, 44 Ohio St., 539, which arose under a law the authority for whose enactment is based both upon the constitutional provision (Schedule, Sec. 18,

Constitution of Ohio) that "no license to traffic in intoxicating liquors shall hereafter be granted in this state, but the General Assembly may by law provide against evils resulting therefrom," and the power of taxation granted in the same organic instrument. The law imposed a tax on the business of trafficking in intoxicating liquors and involved the exercise of both the police power (p. 563, and McGuire v. State, 42 Ohio St., 532) and the power to tax (pp. 562, 563, Anderson v. Brewster, 44 Ohio St., 583). It served a double purpose—the restraint of the evils resulting from the liquor traffic, and the creation of a revenue to indemnify the general taxpayer for the increased burden imposed on him by the business. The tax was said to be in the form and nature of a tax upon the business (p. 563), and in the Southern Gum Company case it is affirmatively characterized as an excise tax applied to the liquor traffic on account of the additional burdens imposed on the state. In this respect it is assimilated to the tax here under consideration, whose object is to compensate the state and indemnify the taxpayer for the increased burden resulting from the special inconvenience and expenses sustained and supervisory power exercised by the government over corporate public utilities and for the benefit of those who own and operate such. Ashley v. Ryan, 49 Ohio St., 504, 525; Cincinnati Gaslight & Coke Co. v. State, 18 Ohio St., 238, 243; Baker v. Cincinnati, 11 Ohio St., 534, 543; Southern Gum Co. v. Laylin, p. 595; Western Union Telegraph Co. v. Mayer. The contention was made in the Adler case that the enforced payment of the tax on the business of trafficking in intoxicating liquors would impose on many of small means such financial hardship as to drive them out of business. The court recognized that such would be the consequence, but it did not deem the law invalid on that account (pp. 560, 561, 567), as such result would arise from extraneous circumstances and not from the law.

Equality in regard to taxation of property is the great idea of the Ohio Constitution. Baker v. Cincinnati, 11 Ohio St., 541. The legislature, conforming as nearly as may be to the purposes of the framers of the constitution, has intended to reach, for taxation, the property of every citizen, whatever its form may be, which is not by the organic law specifically exempt, to the end that all shall bear their just share of the public burdens. Lewis v. State, 60 Ohio St., 479; Southern Gum Co. v. Laylin, p. 598. There can be no exemption of property from taxation, unless the right of exemption is clearly expressed. Lander v. Burke, 65 Ohio St., 532, 542. The estate of an insolvent decedent must contribute, and to the same relative extent as a prosperous enterprise or the estate of a wealthy decedent. Sec. 2784, R. S.; McNeill v. Hagerty, 51 Ohio St., 255, 265. The creditors of an insolvent's estate really pay the tax, just as the bondholders and other creditors of the money losing plaintiff, under the rule of equality, in fact must do, if it be required to pay the excise tax charged against it. But absolute equality and uniformity is not attainable under the Ohio or any other system of taxation. An approximation thereto is all that is practicable. Shotwell v. Moore, 45 Ohio St., 646; Ashley v. Ryan,

49 Ohio St., 525, 526. Judge Cooley, in his work on Taxation, 3rd ed., 390, 391, with great force and accuracy, in speaking on this subject, says:

"It cannot be too distinctly borne in mind that any possible system of tax legislation must inevitably produce unequal and unjust results in individual instances; and if inequality in result must defeat the general law, then taxation becomes impossible, and governments must fall back upon arbitrary exactions. But no such impracticable principle is recognized in revenue laws. While equality and justice are constantly to be aimed at, impossibilities are not demanded. Tax legislation must be practical. * * * The legislature must judge of the general result, and when the law has apportioned the tax, individual hardships must be regarded as among the inconveniences which are incident to regular government. The same necessity that justifies any taxation will justify and sustain any reasonable provisions for giving it effect. The necessity of the state and of reasonable provisions for the security of the individual must be equally considered; the state is no more to be deprived of its revenue, because of individual hardships resulting from general rules, than is an individual to be stripped of his property without law, because in its necessity the state finds it more convenient to take it thus than by regular proceedings. The incidental hardship or inconvenience must be submitted to in either case."

The rule of non-exemption on account of the impracticability of absolute equality of taxation thus recognized by the state court and so clearly stated by Judge Cooley, was applied and enforced as to an excise tax in Marmet v. State, 45 Ohio St., 69, where Judge Spear, speaking for the court, held that absolute equality of
41 burdens, whether applied to taxes or other subjects of legislation, is not to be expected in our laws, and that the wisdom of man has not yet devised a system of equalizing burdens so perfect in its application and so thorough in its enforcement as to leave no room for adverse comment or criticism. An excise tax is not a tax on property, State v. Ferris, p. 326, Cincinnati Gaslight & Coke Co. v. State, p. 243, State v. Hipp, 38 Ohio St., 225, Ashley v. Ryan, 49 Ohio St., 504, 525, but it must, to be valid, operate with equality and uniformity, unaffected by any questions as to the solvency or insolvency of the person that is required to pay. That the rule announced in the Mermet case persists appears from Ashley v. Ryan, pp. 525, 526, and State v. Ferris. In the Ferris case, an inheritance tax law providing for an excise tax on the right to receive property was overthrown, because it violated the rule of equality and did not afford to all upon whom its provisions operated equal protection and benefit. It was said (pp. 337, 338):

"Our constitution requires equality in our tax laws, and also equality in their execution as near as may be. The only exemption allowed, as to taxation of property, is personal property to the amount of two hundred dollars to each individual, and certain other property devoted to public or charitable uses. Two hundred dollars in value to each individual is the extent to which the legislature has the

power to exempt personal property from taxation. The constitution must be regarded as consistent with itself throughout, and as section 2, of article 12, permits an exemption from taxation of personal property not exceeding two hundred dollars, a construction of section 2 of the bill of rights is thereby evinced to the effect that in taxation of subjects other than property, an exemption up to two hundred dollars in value would be regarded as for the equal protection and benefit of the people. The exemption must be equally for all, and the rate per cent must be the same on all estates. There can be no discrimination in favor of the rich or poor. All stand upon an equality under the provisions of the constitution, and it is this equality that is the pride and safeguard of us all."

The above announcement is in harmony with the utterances of the federal courts. In State Railroad T x Cases, 92 U. S., 42 575, a law was under consideration which imposed a tax on the franchise, capital stock, business and profits of the complaining corporations. One of the corporations was insolvent and in the hands of a receiver, its earnings not being sufficient to pay any of the interest on its bonded debt or anything beyond its necessary expenses for operation and repairs. Another of the companies met all of its expenses and interest on a large debt and declared large dividends. Each owned a large amount of tangible property and each possessed a franchise which it was held, as in Ashley v. Ryan, p. 525, to be valuable. They were both said to be alike subject to the law for the reason that insolvent corporations could no more escape taxation than insolvent individuals, many of whom pay taxes on realty which is mortgaged in excess of the value of all their property, both real and personal, the court adding that no state has ventured to establish the principle of permitting its visible tangible property to escape taxation, relying solely on a tax imposed on the individual on the basis of his estimated wealth in excess of his debts. In speaking of the insolvent company, Mr. Justice Miller said:

"Concede for the present that the capital stock is sunk and is of no value; concede that the funded debt of the company has at present no market value, or is unsalable,—there remains what is valued as worth over $2,600,000 of real and personal property, which, like all other property of individuals or corporations ought to pay its proportion of the public burdens. There also remains the value of the franchise, which is not destroyed by the circumstance that the road does not pay interest on its debt. Does anybody believe that this debt is of no value,—that the holders of it attach no value to this franchise? Are they willing to give up the right to operate the road, to receive freights and fares, to endeavor to make it pay something more than the mere value of the personal property of the track, the depots, the grounds, the rolling-stock and other tangible property? Is it supposed by any one that they intend or will ever sell these separately or apart from the right to use them as a railroad? Why do not the bondholders sell all these things under their mortgage at auction as a man would sell town-lots and household furniture, and horses and carriages? The reason is too clear to

escape observation. It is because in the case of the railroad there is attached to all this property, and goes with it, a privilege, a right to use it through the whole extent of the richest counties of
43 Illinois, in transporting persons and property, in a manner which adds immensely to its value when considered as so much iron, so much land, and so much personal property. By virtue of this privilege or franchise, this is all aggregated into a unit, well adapted to make money by its use in that way, with a chartered right to use it for that purpose.

It is this franchise which the legislature of Illinois intended to tax, which it had a right to tax; and in taxing it committed no injustice, if it was fairly assessed, though the corporation which holds it may be so utterly bankrupt that it must necessarily pass from it into other hands. In those hands, disembarrassed of its overweight of debts, who shall say that it is not worth $2,000,000? And who shall say that such is not the real value now of this franchise?

See also Flint v. Stone Tracy Co., pp. 165, 167, 168. We think it can be confidently asserted that the Supreme Court of Ohio meant by the language employed in the Southern Gum Company case that only those excise tax laws, the result of whose operation is generally confiscatory and oppressive, are unconstitutional, and that it did not intend to say that a law, general and uniform in its operation, is invalid, because in exceptional cases it may impose a hardship.

The General Assembly was empowered to impose a tax on the gross receipts of the respective plaintiffs, Western Union Telegraph Co. v. Mayer, pp. 531, 540, State v. Reinmund, 45 Ohio St., 214, Express Co. v. State, 55 Ohio St., 69, 77, State Tax on Ry. Gross Receipts, 15 Wall., 284, and direct the application of the tax when collected to purposes of general revenue or any other purpose authorized by law. Ashley v. Ryan, p. 525; State v. Ferris, p. 314; State v. Guilbert, p. 254. Both of the plaintiffs require governmental protection and the exercise of its supervisory power, and each should in justice bear its fair share of the government's burden. Were either of them to escape taxation on account of its exceptional condition, all other unprofitable corporate enterprises would likewise be relieved, and thus a practical system of taxation would be rendered impossible and the state be deprived of the power to meet its legitimate expenses.

44 The claim that the law in question is discriminatory in that (1) it does not include all public utilities engaged in business in Ohio, and (2) does not operate uniformly among the utilities named, is not supported by either the state or federal decisions. The inheritance tax law under consideration in Hagerty v. State, 55 Ohio St. 613, providing for exemptions in the amount of two hundred dollars, was assailed as discrimatory as among collateral kindred, the tax being imposed upon the value of the property received by some and not upon that received by others. The law was sustained because the power exercised by the general assembly in the enactment of the law was legislative and vested by the legislative grant as expressed in the first section of the second article of the constitution, and as the right to receive property by inheritance is

are guaranteed by the constitution, that instrument prescribes no limitation upon the power of the general assembly to designate the persons who may thus receive. The discrimination was based upon and held justified by the fact that there are degrees in collateral kinship. In commenting on that case in State v. Guilbert, the state court approved the language employed in Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, regarding a similar law, that the states may tax the privilege of taking property by devise or descent, may discriminate between relatives, and between them and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective state constitutions regarding uniformity and equality in taxation. In the Guilbert case, which also involved an inheritance tax law, the conclusion was reached (and we understand it to be the statement of a rule applicable to excise taxes) that——

"When it is determined, as was determined in the Ferris case * * * that the tax is an excise tax, and as in the Hagerty case * * * that the authority to impose the tax is conferred by the general grant of legislative power, then the selection of the subjects on which the tax will be imposed must be within the legislative competency."

45 Many illustrations may be found in the statutes and reported cases of the rule thus announced. In Marmet v. State, an ordinance was upheld imposing a license fee on the owners of all vehicles used upon the streets of Cincinnati excepting farmers marketing the products of their own farms. In the Adler Case, the tax on the business of trafficking in liquors was sustained, although it did not bring within its provisions the manufacture of intoxicating liquors or the sale of them by the manufacturer in quantities of one gallon or more at any one time. The line was drawn between the distillery and the brewery on the one hand and the saloon on the other. In Western Union Telegraph Co. v. Mayer, a corporation franchise tax imposed on foreign express and telegraph companies and on no other public utility companies, was sustained. Section 2780—17, Rev. St., imposed an excise tax for state purposes only of one per cent per annum upon the gross receipts of steam railroad, street and interurban railroad, express, telegraph and telephone companies when engaged in business either wholly or partially within the state, but it did not apply to water transportation companies unless the whole of their business was done within the state. Under the Nichols law (Sec. 2778*a*, R. S.), the property of express, telegraph and telephone companies was subjected to taxation, the value of such property being determined not merely by the consideration of the visible property, as in the case of all other corporations whose property is taxed, but by the value of the entire capital stock and by such other evidence and rules as will enable the boards fixing such valuation to arrive at the true value in money of the entire property of the companies in the state. A tax levied on such valuation was upheld in State v. Jones, 51 Ohio St. 492, and Adams Express Co. v. Ohio, 166 U. S., 185. Notwithstanding the establishment of the validity of that method of

taxation, it was not extended to any other corporations in the state.

The general assembly has seen fit to determine, in the enact-
46 ment of the law now before us, what occupations or lines of industry are public service enterprises and invested with those attributes which pertain to public interest or public service, but has exempted from the operation of the law, for instance, grain elevator companies, warehousing, stockyards, ferries, bridge companies and innkeepers, but it had a right so to do, and the selection made by it will not be disturbed by the courts unless the determination of the legislative body was clearly arbitrary. The law imposes no burden upon one class of utilities from which others similarly situated are exempt, and as it does not affect any right of the plaintiffs differently from that of others in the class to which they belong, it is not obnoxious to the constitution. Shell v. St. Ry. Co., 60 Ohio St., 269; State v. Guilbert, pp. 229, 245; 37 Cyc. 746. The same rule is recognized by the federal courts. In Kane v. Erie R. Co., 133 Fed. Rep., 681, 685, C. C. A. 6, in which a provision of an Ohio statute relating to railways was involved, it was said:

"The doctrine is well settled that the General Assembly, in the absence of an applicable prohibition, has power to classify subjects of legislation, conferring rights or imposing burdens on the created classes, according to its views of what is just and expedient and will promote the general welfare, subject only to the limitation that there must be some reasonable ground for the classification made."

The rule so announced has been recognized in Magoun v. Illinois Trust & Savings Bank, supra, and in Home Ins. Co. v. New York, 134 U. S., 594, in each of which a statute was under consideration which involved an excise tax. Other cases in point are Kentucky Railroad Tax Cases, 115 U. S., 321; Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S., 232; Connolly v. Union Sewer Pipe Co., 184 U. S., 540; Brown-Forman Co. v. Kentucky, 127 U. S., 563; Southwestern Oil Co. v. Texas, 217 U. S., 114; Adams Express Co. v. Ohio, 165 U. S., 194, 228. The law is well expressed in
47 Bell's Gap Railroad Co. v. Pennsylvania (p. 237), where it is said:

"The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution."

In view of what has heretofore been said and authorities cited, it is clear that there is no merit in the contention that, because cer-

tain utilities of a given class pay one rate of tax and others of another class another rate, the law is wanting in uniformity of operation.

Another insistence is that the Act as applied to railroads lays a burden on interstate commerce. The tax by express provision is levied on gross intra-state earnings only. Those derived wholly from interstate business and business done for the federal government are specifically excluded in computing the amount to be paid. The rule announced in Ratterman v. Western Union Tel. Co., 127 U. S., 424, 425, is that where the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the state will be permitted to collect that arising upon the latter. As the gross intra-state earnings can be readily separated from all others, the law is not open to the objection urged. Ratterman v. Express Co., 49 Ohio St., 618; Express Co. v. State, pp. 69, 81; Western Union Tel. Co. v. Kansas, 216 U. S., 1, 31, 32, Kehrer v. Stewart, 197 U. S., 60, 67.

48 The further charge is made that, inasmuch as plaintiffs each pay a property tax, the tax provided by the Act in question is not permissible in that it denies them the equal protection of the law by subjecting them to double taxation. McNeill v. Hagerty, 51 Ohio St., 255, 268; Collett v. Springfield Savings Soc., 13 Ohio C. C., 131, 137. This cannot be true, because the exaction of four per cent of the gross intra-state earnings is not a property tax, but is an excise tax, the amount of which is fixed and measured by the amount of such earnings. Double taxation, in a legal sense, does not exist, unless the double tax is levied upon the same object within the same jurisdiction. Bradley v. Bauder, 36 Ohio St., 28, 35. The plaintiffs pay but one tax on property, and another as an excise tax. The taxation, therefore, is not double. Southern Gum Co. v. Laylin, p. 596.

The Act is also said to be unconstitutional in that it seeks to prevent judicial inquiry into its constitutionality and enforce obedience to its terms and the administrative acts thereunder, irrespective of their validity. To sustain this claim allusion is made to the provision for the recovery of a 15% penalty on unpaid taxes (Sec. 103), to the power to cancel the articles of incorporation of a delinquent corporation (Sec. 120), to the penalty imposed on any one who shall exercise or attempt to exercise any powers, privileges or franchises under the articles of incorporation after the same are cancelled (Sec. 120), to the power to enjoin the transaction of any business by any delinquent public utility (Sec. 123), to each day's wilful failure to observe and comply with any order or direction of the Tax Commission or to perform any duty enjoined by law which the Tax Commission is authorized to administer, constituting a separate and distinct offense (Sec. 158), and to the provision that the holding of any section or part thereof void and ineffective shall not affect any other section or part thereof (Sec. 160). We

49 are not concerned with the validity or operation of any of such sections for the reason that the pleadings tender no issue regarding them. Moreover, the penalties are clearly a separate

part of the Act, and whether collectible or not, may be determined in a case involving an attempt to enforce them. Flint v. Stone Tracy Co., p. 177; Willcox v. Consolidated Gas Co., 212 U. S., 53, 54.

We have noticed such objections as are made to the constitutionality of the law, as it is deemed necessary to consider. We do not find the statute to be obnoxious to either the state or the federal constitution.

It follows that the motion for an interlocutory injunction in such case must be denied. However, the questions involved are of such importance, that we assume that a review of our conclusions will be desired by the plaintiffs, pursuant to the special provision found in Sec. 266, Judicial Code, Act of March 3, 1911, 36 Stat., 1162.

We have accordingly concluded that the restraining orders heretofore granted shall be continued until an opportunity has been given for the plaintiffs to secure a review, and subject to conditions which will be prescribed in the order to be entered.

That the right of appeal directly to the Supreme Court from our decision may not be embarrassed, we refrain at the present time from passing upon the demurrers.

J. W. WARRINGTON,
*U. S. Circuit Judge.*
J. E. SATER,
*U. S. Dist. Judge.*
WILLIAM L. DAY,
*U. S. District Judge.*

50 *Entry (Injunction Refused, etc.).*

And afterwards, towit: on the 13th day of June, A. D. 1913, an Entry was made upon the Journal of said Court in said cause, which said Entry is clothed in the words and figures following, towit:

In the District Court of the United States, Southern District of Ohio, Eastern Division. In Equity.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
ROBERT M. DITTEY, FRANK E. MUNN, and CHRISTIAN PABST, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Entry.

The plaintiff herein having made application for an interlocutory injunction herein suspending or restraining the enforcement and operation and execution of certain statutes of the State of Ohio by restraining the action of certain officers of said State, defendants herein, in the enforcement and execution of such statutes, and such application having been presented to the Honorable John E. Sater, District Judge of said Court, in chancery sitting, and said District

Judge thereupon having immediately called to his assistance to hear and determine said application, two other Judges of said Court, towit, the Honorable John W. Warrington, Circuit Judge of said Court, and the Honorable William L. Day, District Judge of said Court, and more than five days' notice of the hearing of said application having been given to the Governor and to the Attorney General of said State of Ohio and to the defendants herein, said application for an interlocutory injunction came on to be heard before and by said three Judges of said Court, upon the verified bill of complaint of the plaintiff, the facts averred in which said bill of complaint were by the defendants, for the purpose of said application for an interlocutory injunction, and not otherwise, admitted to be true, and was argued by counsel for plaintiff and defendants; on consideration whereof the said Court, said three Judges sitting therein as aforesaid and concurring, find that said application for an interlocutory injunction is not well taken; and it is by
51 the Court ordered that said interlocutory injunction asked for by the plaintiff as aforesaid be and it is hereby denied; to which finding of said Court and the denying of said interlocutory injunction plaintiff excepts. And the plaintiff thereupon gives notice of its intention to appeal from said order denying said interlocutory injunction, direct to the Supreme Court of the United States; and thereupon the Court fixes the appeal bond in the sum of five hundred — ($500.00).

J. E. SATER, *D. J.*

Approved, this 27th day of May, 1913,

TIMOTHY S. HOGAN,
*Attorney General, Attorney for Defendants.*
CLARENCE D. LAYLIN,
FRANK DAVIS, Jr.,
*Of Counsel.*

*Petition for Appeal, With Order Allowing Same Endorsed Thereon.*

And afterwards, towit: on the 25th day of June, A. D. 1913, came the Plaintiff, by its Attorneys, and filed in the Clerk's Office of said Court, its certain Petition for Appeal, with Order allowing same endorsed thereon, in this cause, which said Petition for Appeal is clothed in the words and figures following, towit:

In the District Court of the United States, Southern District of Ohio, Eastern Division. In Equity.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

ROBERT M. DITTEY, FRANK E. MUNN, and CHRISTIAN PABST, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Petition for Appeal.

The above named plaintiff, The Ohio River and Western Railway Company, a corporation, conceiving itself aggrieved by the decree made and entered on the 13th day of June, 1913, in the above entitled cause, wherein and whereby said plaintiff was denied, after notice and hearing, an interlocutory injunction in said cause, suspending or restraining the enforcement, operation and execution of the statutes of the State of Ohio, by restraining the action of certain officers of said State, towit, the defendants herein, in the enforcement or execution of such statutes, does hereby appeal from said order and decree denying interlocutory injunction, as aforesaid, to the Supreme Court of the United States, for the rea-
52 sons specified in the assignment of errors which is filed herewith; and prays that this appeal may be allowed and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

ROB'T J. KING,
*Attorney for Plaintiff.*

Dated this 14th day of June, 1913.

The foregoing claim of appeal is allowed, and bond is fixed at $500.00.

Dated this 25th day of June, 1913.

J. E. SATER,
*Dist. Judge.*

And afterwards, towit: on the 25th day of June, A. D. 1913, came the Plaintiff, by its Attorneys, and filed in the Clerk's Office of said Court, its certain Assignment of Errors on Appeal in this cause, which said Assignment of Errors on Appeal is clothed in the words and figures following, towit:

*Assignment of Errors on Appeal.*

In the District Court of the United States, Southern District of Ohio, Eastern Division. In Equity.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

ROBERT M. DITTEY, FRANK E. MUNN, and CHRISTIAN PABST, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Assignment of Errors on Appeal.

Plaintiff prays an appeal from the order and decree of this Court denying the plaintiff, after notice and hearing, an interlocutory, injunction in said cause, to the Supreme Court of the United States, and assigns for error:

58 First. The Court erred in refusing the plaintiff an interlocutory injunction against defendants, restraining the defendants Dittey, Munn and Pabst, as The Tax Commission of Ohio, from certifying to the Auditor of State the gross earnings of the plaintiff for business done within the State during the current year, and from making any certification whatsoever to said Auditor against plaintiff for the current year, for or in connection with or as a basis for the so-called "excise tax" provided for by the Ohio statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224,) and from taking or authorizing any action against plaintiff in connection with said tax.

Second. The Court erred in holding that the facts averred in the bill, (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the so-called excise tax imposed by the statutes of Ohio, (Act of May 31st, 1911, 102 Ohio Laws, 224,) upon the privilege of carrying on plaintiff's intrastate business for the current year, was wholly in excess of the value of that privilege, in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and of the preamble and Sections 2 and 19 of the Bill of Rights of the Ohio Constitution, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Third. The Court erred in holding that the facts averred in the bill, (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the classifications and sub-classifications in the Ohio statutes providing for the so-called excise tax, (Act of May 31st, 1911, 102 Ohio Laws, 224,) were arbitrary, unreasonable, unduly and unjustly discriminatory against the plaintiff, and not a legitimate exercise of legislative power or discretion, thereby violating the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and Sections 2 and 19 of the Bill of

54 Rights of the Ohio Constitution, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Fourth. The Court erred in holding that the facts averred in the bill, (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the Ohio statutes providing for the so-called excise tax, (Act of May 31st, 1911, 102 Ohio Laws, 224,) involved a discrimination against and imposed a burden upon interstate commerce, in violation of the commerce clause of the Constitution of the United States, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Fifth. The Court erred in holding that the facts averred in the bill (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the Ohio statutes imposing the so-called excise tax, (Act of May 31st, 1911, 102 Ohio Laws, 224,) are a regulation of and a burden upon foreign commerce, in violation of the commerce clause of the Constitution of the United States, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Sixth. The Court erred in holding that the facts averred in the bill, (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the so-called excise tax imposed by the Ohio statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224,) is in reality a double tax upon plaintiff's property, lacking uniformity and equality, in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and Section 2, Article 12, of the Constitution of Ohio, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

55 Eighth. The Court erred in holding that the guaranty against the imposition of a privilege tax greater in amount than the reasonable value of the privilege taxed, involved in the preamble and Sections 2 and 19 of the Bill of Rights of the Ohio Constitution, as interpreted and construed by the Ohio Supreme Court, particularly in the case of Southern Gum Company v. Laylin, Secretary of State, 66 Ohio State, 578, is appliable and operative only where the privilege tax is generally confiscatory and oppressive, and may not be invoked in individual cases wherein the tax exceeds the reasonable value of the privilege originally conferred or its continued annual value thereafter, and in consequently refusing relief by a temporary injunction from the current so-called excise tax imposed by the Ohio statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224,) on the privilege of carrying on its intrastate business, because it has not been shown that the tax in other instances, and generally, exceeded the reasonable value of the privilege taxed.

Ninth. The Court erred in holding the so-called excise tax imposed by the Ohio Statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224), to be an excise tax on the doing of corporate intrastate business.

Tenth. The Court erred in holding that the so-called excise tax imposed by the Ohio statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224,) might be regarded as an exercise of the police power of

the State, similar in its nature to that involved in the taxation of the business of trafficking in intoxicating liquors; and thereby saved from Constitutional infirmity.

Eleventh. The Court erred in holding that the so-called excise tax imposed by the Ohio statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224,) might be regarded as a legislative act to compen-
56 sate the State and indemnify the tax payer for the increased burden resulting from the special inconvenience and expenses sustained and supervisory power exercised by the Government over corporate public utilities and for the benefit of those who own and operate such; and thereby saved from Constitutional infirmity.

Twelfth. The Court erred in holding that relief could not be afforded the plaintiff under the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States, or the preamble and Sections 2 and 19 of the Bill of Rights of the Ohio Constitution, from the current so-called excise tax imposed by the Ohio statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224,) on the ground that in plaintiff's case such tax wholly exceeded the value of the privilege taxed, without at the same time declaring the said tax invalid in its entirety and throughout the field of its application, or, at least, as to all utilities classed with the plaintiff.

ROB'T J. KING,
*Attorney for Plaintiff.*

And afterwards, towit: on the 25th day of June, A. D. 1913, there was filed in the Clerk's Office of said Court a certain Bond in this cause, which said Bond is clothed in the words and figures following, towit:

*Bond.*

Know all men by these presents, that we, The Ohio River and Western Railway Company, as principal, and The Title Guaranty & Surety Co., as sureties, are held and firmly bound unto Robert M. Dittey, Frank E. Munn and Christian Pabst as The Tax Commission of Ohio, and The Tax Commission of Ohio, in the full and just sum of Five hundred Dollars, to be paid to the said Robert M. Dittey, Frank E. Munn and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, their certain at-
57 torneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 25th day of June, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a term of the District Court of the United States for the Southern District of Ohio, Eastern Division, in a suit depending in said Court, between The Ohio River and Western Railway Company, and Robert M. Dittey, Frank E. Munn and Christian Pabst, as The Tax Commission of Ohio, and The Tax

Commission of Ohio, a decree was rendered against the said The Ohio River and Western Railway Company, and the said The Ohio River and Western Railway Company having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Robert M. Dittey, Frank E. Munn and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, citing and admonishing them to be and appear at a session of the United States Supreme Court to be holden at the City of Washington.

Now, the condition of the above obligation is such, That if the said The Ohio River and Western Railway Company, shall prosecute its appeal to effect, and answer all damages and cost if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue. Sealed and delivered in the presence of

THE OHIO RIVER AND WESTERN RAILWAY COMPANY,
By ROB'T J. KING, *Its Att'y.*

[SEAL.] THE TITLE GUARANTY & SURETY CO.,
By C. H. BANCROFT, *Att'y in Fact.*

Approved, by
J. E. SATER,
*U. S. District Judge, S. D. O.*

58 And afterwards, towit: on the 30th day of June, A. D. 1913, came the Plaintiff, by its Attorneys, and filed in the Clerk's Office of said Court its certain Precipe for Transcript in this cause, which said Precipe for Transcript is clothed in the words and figures following, towit:

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
ROBERT M. DITTEY et al., Defendants.

*Precipe.*

To the Clerk:

You are requested to take a transcript of the record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript the entire record.

Respectfully,

ROB'T J. KING,
*Attorney for Plaintiff.*

Service of a copy of the foregoing precipe is hereby acknowledged, this twenty-fifth day of June, 1913.

TIMOTHY S. HOGAN,
*Attorney General;*
FRANK DAVIS, JR., &
CLARENCE D. LAYLIN,
*Attorneys for Defendants.*

59 THE UNITED STATES OF AMERICA,
*Southern District of Ohio, Eastern Division, ss:*

I, B. E. Dilley, Clerk of the District Court of the United States, within and for the District and Division aforesaid, do hereby certify that the foregoing is a true and correct transcript of the record, as the same appears on file and of record in the Clerk's Office of said Court, in the therein entitled cause.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Columbus, Ohio, this 30th day of June, 1913.

[Seal United States District Court, Southern Dis. of Ohio.]

B. E. DILLEY, *Clerk,*
By C. P. WHITE, JR., *Deputy.*

[Endorsed:] No. 1593. United States District Court, Southern District of Ohio, Eastern Division. The Ohio River and Western Railway Company v. Robert M. Dittey, et al. Transcript of Record.

60 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States at the City of Washington, within thirty days from the date of this writ, pursuant to an appeal duly allowed by the District Court for the Southern District of Ohio, Eastern Division, and filed in the Clerk's office of said Court on the 25th day of June, A. D. 1913, in a case wherein The Ohio River and Western Railway Company, a corporation, is appellant, and you are the appellees, to show cause, if any, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John E. Sater, District Judge of said District Court, this 25th day of June, A. D. 1913.

J. E. SATER,
*District Judge of the United States District Court for the Southern District of Ohio, Eastern Division.*

Service of a copy of this citation is hereby admitted, this 25th day of June, A. D. 1913.

TIMOTHY S. HOGAN,
*Attorney General, Solicitor for the said Appellees.*

CLARENCE D. LAYLIN,
FRANK DAVIS, Jr.,
*Of Counsel.*

61 [Endorsed:] No. 1593. Citation. United States of America, ss. The President of the United States to Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio. Filed Jun- 25, 1913. B. E. Dilley, clerk.

Endorsed on cover: File No. 23,793. S. Ohio D. C. U. S. Term No. 642. The Ohio River and Western Railway Company, appellant, vs. Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and the Tax Commission of Ohio. Filed July 14th, 1913. File No. 23,793.

(23,794)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1913.

## No. 643.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, APPELLANT,

vs.

DAVID S. CREAMER, TREASURER OF STATE OF THE STATE OF OHIO; EDWARD M. FULLINGTON, AUDITOR OF STATE OF THE STATE OF OHIO; TIMOTHY S. HOGAN, ATTORNEY GENERAL OF THE STATE OF OHIO; ROBERT M. DITTEY, FRANK E. MUNN, AND CHRISTIAN PABST, AS THE TAX COMMISSION OF OHIO, AND THE TAX COMMISSION OF OHIO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

INDEX.


| | Original. | Print |
|---|---|---|
| Caption | 1 | 1 |
| Bill of complaint | 1 | 1 |
| Order granting temporary restraining order | 10 | 11 |
| Restraining order bond | 19 | 13 |
| Temporary restraining order | 21 | 14 |
| Subpœna | 23 | 15 |
| Temporary restraining order returned | 24 | 15 |
| Subpœna returned | 26 | 16 |
| Order for temporary restraining order to continue in force | 27 | 17 |
| Order granting leave to file demurrer | 28 | 18 |



Byron S. Adams & Detweiler (Inc.), Printers, Washington, D. C., November 17, 1913.

| | Original. | Print |
|---|---|---|
| Demurrer | 28 | 18 |
| Order setting case for hearing November 20, 1912 | 30 | 20 |
| Opinion *per curiam* | 32 | 21 |
| Order refusing injunction, etc | 51 | 33 |
| Petition for appeal | 53 | 35 |
| Order allowing appeal | 53 | 35 |
| Assignment of errors | 54 | 36 |
| Bond on Appeal | 59 | 39 |
| Precipe for record | 61 | 40 |
| Clerk's certificate | 62 | 40 |
| Citation and service | 63 | 41 |

1 At a stated term of the District Court of the United States within and for the Sixth Judicial Circuit and Eastern Division of the Southern District of Ohio, begun and held at the Court Rooms in the City of Columbus, on the first Tuesday of December, being also the third day of that month, in the year of our Lord One Thousand Nine Hundred and Twelve, and in the One Hundred and Thirty-seventh year of the Independence of the United States of America.

Present: The Hon. John E. Sater, District Judge.

Among the proceedings had were the following, to wit:

No. 1600.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

DAVID S. CREAMER, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as the Tax Commission of Ohio, and the Tax Commission of Ohio, Defendants.

Be it remembered that heretofore, to wit, on the 11th day of December, A. D. 1911, came the Plaintiff, and filed in the Clerk's Office of said Court, its certain Bill of Complaint in this cause, against said defendant, which said Bill of Complaint is clothed in the words and figures following, to wit:

*Bill of Complaint.*

In the United States Circuit Court for the Southern District of Ohio, Eastern Division.

2 In Equity.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

DAVID S. CREAMER, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as the Tax Commission of Ohio, and the Tax Commission of Ohio, Defendants.

Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States in and for the Southern District of Ohio, Eastern Division, in Chancery Sitting:

The Marietta, Columbus and Cleveland Railroad Company, a corporation duly organized under the laws of the State of Ohio, having

its principal office and place of business in the County of Washington and State of Ohio, and a resident and citizen of said State of Ohio, brings this, its bill, against David S. Creamer, Treasurer of State of the State of Ohio, Edward M. Fullington, Auditor of State of the State of Ohio, Timothy S. Hogan, Attorney General of the State of Ohio, Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, all of whom are residents of the City of Columbus, Franklin County, Ohio, and are citizens and inhabitants of said City of Columbus, Franklin County, Ohio, and of said Southern District of Ohio, Eastern Division.

And thereupon the plaintiff complains and says:

1. The controversy herein arises under the Constitution of the United States. The amount in dispute and involved herein, exclusive of interest and costs, exceeds the sum or value of two thousand dollars.

2. The Marietta, Columbus and Cleveland Railroad Company, the plaintiff herein, is, and for several years last past has been, a corporation duly formed and existing as such under the laws of Ohio, for the purpose of owning and operating a railroad extending from Moore's Junction, in Washington County, Ohio, through a portion of said Washington County and a portion of Morgan and Athens Counties, Ohio, and terminating at Palos, in said Athens County, Ohio, in all a distance of about forty-one and nine hundredths (41.09) miles. The plaintiff owns and operates, and during said period has owned and operated, said railroad, and for that purpose owns and uses the necessary rolling stock, fixtures and appurtenances, and is and has been engaged in the transportation of persons and property as a common carrier and is engaged in interstate and foreign commerce, and in intrastate commerce. Plaintiff also operates into and out of Marietta, Ohio, under trackage arrangement.

3. The defendant, David S. Creamer, is the Treasurer of State of the State of Ohio. The defendant, Edward M. Fullington, is the Auditor of State of the State of Ohio. The defendant, Timothy S. Hogan, is the Attorney General of the State of Ohio. The defendant, The Tax Commission of Ohio, is a commission created by an Act of the General Assembly of Ohio, enacted May 10th, 1910, entitled:

"An Act to create a tax commission, define its powers and duties," etc. 101 Ohio Laws, 399); and also an Act of the General Assembly of Ohio, enacted the thirty-first day of May, 1911, entitled: "An Act to repeal sections 5446 to 5542-8, inclusive, of the General Code, as enacted May 10, 1910 (101 Ohio L., 399), relating to the tax commission of Ohio and to further define its powers and duties."—which said Acts clothe the defendants respectively with certain powers and impose upon them certain duties.

4. Sections 81 and 83 of said Act of May thirty-first, 1911, require each railroad company annually, on or before the first day of September, under oath, to make and file with said Tax Commission a statement setting forth, among other things, the

entire gross earnings, including all sums earned or charged, whether actually received or not, for the year ending on the thirtieth day of June next preceding, from whatever source derived, for business done within this state excluding therefrom all earnings derived wholly from interstate business or business done for the federal government, and also the total gross earnings of such Company for such period in this state for business done within this state.

5. Section 88 of said Act provides that on the first Monday of October, said Commission shall ascertain and determine the gross earnings of each railroad company whose line is wholly or partially within this state, for the year ending on the thirtieth day of June next preceding, excluding therefrom all earnings derived from interstate business or business done for the federal government; and that the amount so ascertained by said Commission shall be the gross earnings of such railroad company for such year.

6. Section 93 of said Act provides that on the first Monday of November, said Commission shall certify to the Auditor of State the amount of gross earnings so determined of each railroad company, for the year ending on the thirtieth day of June next preceding.

7. Section 97 of said Act provides that in the month of November, the Auditor of State shall charge for collection from each railroad company a sum in the nature of an excise tax for the privilege of carrying on its intrastate business, to be computed on the amount so fixed and reported to him by said Commission as the gross earnings of such company on its intrastate business for the year covered by its annual report to said Commission, as required by said Act, by taking four per cent. of all such gross earnings, which said tax shall not be less than ten dollars in any case.

8. Section 99 provides that the Auditor of State shall then prepare proper duplicates and reports and certify them to the Treasurer of State for collection, and that upon the receipt of such duplicates the Treasurer shall notify each company of the amount of taxes due from it.

9. Section 102 of said Act provides that if any public utility, including railroads, fails or refuses to pay, on or before the fifteenth day of December, the tax assessed against it, the Treasurer of State shall certify the same to the Auditor of State, who shall add to the tax a penalty of fifteen per cent. thereon and prepare proper duplicates of such taxes and penalties and certify them to the Treasurer of State for collection.

10. Section 103 of said Act provides that such taxes and penalties may be recovered by an action in the name of the State, which may be brought in the Court of Common Pleas of Franklin County or of any county in which the corporation has an office or place of business, or in which the public utility is doing business; that the Attorney General shall institute such an action in any of such courts as said Commission may direct, and that in any such action it shall be sufficient to allege that the tax or penalty sought to be recovered stands charged on the delinquent duplicate of the Treasurer of State, and that the same has been unpaid for a period of thirty days after having been placed thereon.

11. Said Act further provides that said excise tax shall be paid into and become a part of the general revenue fund of the State.

12. Said Act further provides that these taxes and penalties required to be paid by it shall be the first and best lien on all the property of the public utility or corporation.

6 13. Section 120 of said Act provides that if a corporation fails to pay said tax for ninety days after the time prescribed in said Act as aforesaid for paying the same, the said Commission shall certify such fact to the Secretary of State, and the Secretary of State shall thereupon cancel the articles of incorporation of such corporation, if it be organized under the laws of Ohio, by proper entry upon the margin of the record thereof, and that thereupon all the powers, privileges and franchises conferred upon such corporation by such articles of incorporation shall cease and determine.

14. Section 121 of said Act provides that any person or persons who shall exercise or attempt to exercise any powers, privileges or franchises under the articles of incorporation after the same are cancelled, shall be fined not less than two hundred dollars nor more than one thousand dollars.

15. Section 123 of said Act provides that in addition to all other remedies, the Attorney General shall, upon the request of said Commission, whenever said tax or said penalty shall have remained unpaid for a period of ninety days, apply to the Common Pleas Court of Franklin County, Ohio, or of any county of the State where said public utility or corporation is located, for an injunction to restrain the same from the transaction of any business within this State until the payment of such tax or penalty, and that if it be made to appear to the court, upon hearing thereof, that such public utility has failed or neglected for ninety days to pay said tax or penalty, such Court of Common Pleas shall grant and issue such injunction.

16. Section 33 of said Act provides that no injunction shall issue, suspending or staying any order, determination or direction
7 of the Commission, or any action of the Auditor of State, Treasurer of State, or Attorney General, required by law to be taken in pursuance of any such order, determination or direction; but nothing herein shall affect any right or defense in any action to collect any tax or penalty.

17. Prior to September first, 1911, the plaintiff, solely to avoid the pains, penalties and forfeitures herein described, and not admitting or intending to admit the validity of said tax, but objecting to and protesting against the same, filed with said Commission, upon its demand therefor, under the pains and penalties of said Act, a statement showing, among other things, the entire gross earnings of the plaintiff, including all sums earned or charged, whether actually received or not, for the year ending June thirtieth, 1911, from whatever source derived, for business done within this state, excluding therefrom all earnings derived from interstate business or business done for the federal government, said entire gross earnings being the sum of fifty-seven thousand, five hundred and thirty-one dollars ($57,531.).

18. On October 2nd, 1911, being the first Monday of October, said

Commission ascertained and determined the gross earnings of the plaintiff at said sum of fifty seven thousand, five hundred and thirty one dollars ($57,531.).

19. On the first Monday of November, 1911, towit, November sixth, 1911, said Commission certified to the Auditor of State the amount of gross earnings of the plaintiff so determined by it as aforesaid, and said Auditor of State thereupon charged for collection from the plaintiff a sum purporting to be in the nature of an excise tax for the privilege of carrying on its intrastate business, which sum was four per cent. of said amount so certified by said Commission, towit, twenty-three hundred and one dollars and twenty-four cents ($2,301.24), and said Auditor of State thereupon prepared duplicates and a report containing said sum charged against
8 the plaintiff and certified the same to the Treasurer of State for collection, who notified plaintiff thereof.

20. If the plaintiff fails or refuses to pay said sum of twenty-three hundred and one dollars and twenty-four cents ($2,301.24) on or before the fifteenth day of December, 1911, the defendant, David S. Creamer, Treasurer of State of the State of Ohio, will forthwith certify the name of the plaintiff to the defendant, Edward M. Fullington, Auditor of State of the State of Ohio, who will forthwith add to said sum of twenty-three hundred and one dollars and twenty-four cents ($2,301.24) a penalty of fifteen per cent. thereon, and will forthwith prepare duplicates and a report of such tax and penalty thereon and certify them to the defendant, David S. Creamer, Treasurer of State of the State of Ohio, for collection; and the defendant, The Tax Commission of Ohio, will, as provided in Section 120 of said Act as aforesaid, certify to the Secretary of State the fact of such failure on the part of the plaintiff to pay said tax and said penalty, and said Secretary of State will thereupon forthwith cancel the articles of incorporation of the plaintiff.

21. The capital of the plaintiff has been and is, practically without exception, all invested in the said railroad owned and operated by it as aforesaid, which said investment was and is a reasonable and proper one.

22. Due care and prudence have been exercised in the construction, maintenance, operation and equipment of said railroad property and in the conduct of its business, nor have the same been characterized by waste or extravagance. On the contrary, the greatest economy has been and is being practiced in a bona fide effort to make said railroad yield a fair return upon the investment therein, and all practical means have been exhausted to increase or render more remunerative plaintiff's freight and passenger traffic, or either of them.

9 23. Plaintiff's efforts to increase the revenue from its passenger traffic have been largely defeated and rendered ineffectual by the enactment and enforcement by the State of Ohio of the so-called two cent passenger fare law, which said law the plaintiff, though believing the same to be confiscatory, have obeyed for fear of the enormous pains and penalties imposed for its violation.

24. Notwithstanding the efforts of the plaintiff, it has never been able to earn and is not now able to earn, from its interstate or its intrastate business or both combined, after paying necessary and proper expenses, including taxes other than said excise tax, a return on the investment in its said railroad, or on the value thereof, equal to or as much as the current rate of return on legitimate and high grade investments at all times readily available on the market, nor have its intrastate earnings, after deducting expenses properly attributable to intrastate operations (including taxes other than said excise tax) been sufficient to yield a return on that portion of said investment, or on that portion of said value, properly attributable to intrastate operations, equal to or as much as the current rate of return on legitimate, high grade investments at all times readily available on the market as aforesaid. On the contrary, the plaintiff's gross earnings have not been and are not sufficient to pay its actual operating expenses, nor are its gross intrastate earnings sufficient to pay that portion of its operating expenses properly at-ributable to intrastate operations including taxes other than said excise tax, and the plaintiff is actually operating its railroad at a great loss; and said conditions will continue to exist and will exist during the year which said excise tax is intended to cover.

25. Said excise tax and every part thereof exceeds the reasonable annual value of the privilege of carrying on plaintiff's intrastate business, and said excise tax for the current year, amounting to twenty-three hundred and one dollars and twenty-four cents ($2,301.24) as aforesaid, is wholly and as to every part thereof in excess of the reasonable annual value of carrying on plaintiff's intrastate business during said current year. Said tax is, therefore, invalid and void and in violation of the Constitution of Ohio and particularly the preamble thereof, and Sections 2 and 19 of the Bill of Rights thereof, and in violation of Article 2 of the Ordinance of 1787, and in violation of the Fourteenth Amendment to the Constitution of the United States.

26. Plaintiff further says that said Act of May thirty-first, 1911, attempts to classify the corporations carrying on business in the State of Ohio, for the purpose of raising general revenue by an excise tax imposed for the privilege of carrying on intrastate business; that said Act provides that an excise tax for such privilege shall be imposed upon all public utilities, as defined by said Act. In Section 39 of said Act, the term "public utility," as used therein, is defined to include corporations, firms and individuals engaged in certain lines of business affected with a public interest, including railroads, but such definition does not include or purport to include all kinds of business affected with a public interest carrying on intrastate business in the State of Ohio, nor all real public utilities so carrying on such business therein. The intrastate business of many of said excluded public utilities is and has been and will be highly remunerative, and the privilege of carrying the same on *or* equal or greater value than the privileges sought to be taxed by said excise tax. The privilege of carrying on their intrastate business by said excluded classes of public utilities is not taxed by said Act or by

any other law whatsoever. The public utilities upon which said excise tax is imposed by said Act must compete and continue to compete with said excluded classes of public utilities in the
11 money markets for the securing of funds necessary to the establishment, betterment, and maintenance of their respective lines of business, and by reason of the arbitrary and discriminatory classification aforesaid under which certain public utilities are subject to said excise tax and others are excluded and free therefrom, those utilities subject thereto, including railroad companies, are placed at a great and constant disadvantage in perfecting and maintaining their several financial arrangements, and will continue to be.

27. Plaintiff further says that said classification is arbitrary, unreasonable, and unduly and unjustly discriminatory against all of the corporation- included in said Section 39 of said Act, and particularly railroad companies, and is unjustly and unduly unequal in its operation, and is not a legitimate exercise of legislative power or discretion, and by reason thereof said classification and said excise tax based thereon are invalid and in violation of the Constitution of Ohio and particularly the preamble thereof, and Sections 2 and 19 of the Bill of Rights thereof, and also of the Fourteenth Amendment to the Constitution of the United States.

28. Plaintiff further says that said Act makes a subclassification of the public utilities enumerated in Section 39 thereof as aforesaid, by which it imposes an excise tax upon railroad companies and pipe line companies, computed by taking four per cent. of their intrastate earnings, and imposes upon all other public utilities mentioned in said Section a similar excise tax computed by taking one and two-tenths (1.2) per cent. of their gross receipts upon intrastate business, excepting express and telephone companies, as to which the tax is computed by taking two (2) per cent. of such gross earnings; that said sub-classification is unreasonable, arbitrary, unjust, and unjustly and unduly discriminatory as against railroad companies, and is not based upon nor in proportion to their several abilities to pay
12 said tax or the respective values of the privileges taxed, and is not a legitimate exercise of legislative power or discretion; that the value of the privileges upon which the 1.2 and 2 per cent. taxes are imposed are and have been and will be equal to or greater than the value of the privileges upon which the four per cent. tax is imposed, and are not otherwise taxed by said Act or by any other law whatsoever. The pipe line companies and railroad companies, including the plaintiff, upon which said four per cent. tax is imposed by said Act, must compete and continue to compete with said utilities upon which the 1.2 and 2 per cent. taxes are imposed, in the money markets for the securing of funds necessary to the establishment, betterment and maintenance of their respective properties. and by reason of the arbitrary and discriminatory sub-classification aforesaid, said utilities subject to the faur per cent. tax, including the plaintiff, are placed at a great and constant disadvantage and subjected to an unjust and unreasonable discrimination in perfecting and maintaining their several financial arrangements. Said rail-

road companies also, in many instances, are forced to compete for traffic with interurban railroads, upon which a tax of but 1.2 per cent, is imposed, and by reason of said sub-classification said interurban railroads are placed in a position of unfair and unreasonable advantage over said railroads, and said railroads, particularly the plaintiff, are subject to an unfair and unreasonable discrimination against them and in favor of said interurban railroads. Said sub-classification is unjustly and unduly unequal in its operation, and is wholly arbitrary and unreasonable, and by reason thereof said sub-classification and said four per cent excise tax based thereon are invalid and in violation of the Constitution of Ohio and particularly the preamble thereof, and Sections 2 and 19 of the Bill of Rights thereof, and also of the Fourteenth Amendment to the Constitution of the United States.

13 29. Plaintiff further says that the percentage of gross earnings from intrastate business to total gross earnings varies very widely among the railroads operating in said State, and will continue to do so; that in the case of small local roads, to which class plaintiff belongs, this percentage is high, and the four per cent. tax represents a much greater relative deduction from their total gross earnings than is true in the case of the large interstate railroads, that the cost of conducting local and intrastate business is much greater than the cost of conducting through or interstate business, and such local business is much less profitable.

30. Plaintiff further says that the value of the privilege of carrying on their intrastate business is of much less value to said small local roads, and particularly the plaintiff, than is the value of conducting their intrastate business to the large interstate lines; that the aforesaid difference in cost and in value are and have been matters of common knowledge and general recognition; that as between the several railroads operating in Ohio said four per cent. tax is grossly unjust and unreasonable and discriminatory as against the plaintiff and other railroads similar situated, and places them at a constant disadvantage in competing with the roads upon which the tax bears so much less heavily, as aforesaid. Plaintiff further says that said four per cent. tax is arbitrary, unreasonable, and unduly and unjustly discriminatory against the plaintiff and grossly unequal in its operation as against the plaintiff, and by reason thereof said tax is invalid and in violation of the Constitution of Ohio and particularly the preamble thereof, and Sections 2 and 19 of the Bill of Rights thereof, and also of the Fourteenth Amendment to the Constitution of the United States.

31. Plaintiff further says that for several years prior to the passage of the Act of May tenth, 1910, as aforesaid, the State
14 had attempted to levy an excise tax for the privilege of carrying on their respective lines of business within this State, computed by taking one per cent. of all their gross earnings, upon the several public utilities named in Section 39 of said Act of May thirty-first, 1911; that some of said public utilities, principally railroads and pipe line companies, were engaged in interstate commerce, and it appearing that said one per cent. tax was therefore

invalid, as in violation of the commerce clause of the Federal Constitution, said Acts of May tenth, 1910, and May thirty-first, 1911, were enacted, by which it was attempted, as to the railroads and pipe line companies, to increase the percentage of four per cent. and limit its application nominally to intrastate commerce; the percentage as to other utilities being left practically unchanged; that said increase of said tax to four per cent. was intended to be and was and is an attempt to discriminate against untilities engaged in interstate commerce, and to levy a tax upon interstate commerce and to regulate the same, and that by reason thereof said four per cent. tax is invalid and in violation of the commerce clause of the Federal Constitution.

32. Plaintiff further says that said tax is an attempt to levy a tax upon and to regulate and to impose a burden upon foreign commerce, and is, therefore invalid and in violation of the commerce clause of the Federal Constitution.

33. Plaintiff further says that under Section 47 of said Act of May thirty-first, 1911, said Commission is required to ascertain and assess at its true value in money, all the property in this state of each public utility subject to the Act, including railroads; that by reason thereof said Commission assessed all the property in this state of the plaintiff, that said four per cent. tax is in reality a double tax on plaintiff's property, and is in effect and in fact a property tax, lacking uniformity and equality, and is unequal and unjust and in violation of Section 2, Article 12, of the Constitution of Ohio, and of the Fourteenth Amendment to the Constitution of the United States.

34. Plaintiff has paid all taxes and assessments legally due and payable.

35. Plaintiff further says that by reason of the premises the tax charged against it, as aforesaid, is unconstitutional, invalid and void; that nevertheless, unless this Court shall interfere, as hereinafter prayed for, the plaintiff will be compelled to pay the same or else incur the pains and penalties prescribed in said Act, and if it does not pay said tax, then said penalty will be added thereto as aforesaid, and will, in addition to said principal sum of said tax, become a lien upon the plaintiff's real estate and a cloud upon its title thereto; and the plaintiff will be subjected to numerous harrassing and vexatious suits for the enforcement of said lien, and a further clouding of the plaintiff's title, and otherwise. And the plaintiff's articles of incorporation will be cancelled and its corporate franchises destroyed and its right to be a corporation terminated, and it will be prevented from further serving the public as a common carrier in either intrastate or interstate commerce, and its property will be wrongfully seized for the payment of said tax.

36. Plaintiff further says that it will be impossible to secure an adjudication as to the validity of said tax within the period named in Section 120 of said Act, by interposing such invalidity as a defense to any suit that might be brought for its collection or enforcement; that the purpose and necessary effect of the several provisions of said Act is to compel the plaintiff to pay said illegal or void tax and penalty or to forfeit all its charter rights and franchises, and to have

its corporate existence destroyed, and that it is necessary to interpose at this stage in order to secure relief therefrom.

16 37. Plaintiff further says that said Section numbered 33 of said Act attempts to prevent any judicial examination of the validity of said Act, or any judicial construction of its meaning, and therefore is confiscatory, and if enforced against plaintiff will take its property without due process of law and will deny to it the equal protection of the law, in violation to the Fourteenth Amendment to the Constitution of the United States, and Section 16 of Ohio Bill of Rights.

38. Plaintiff further says that the damages it will suffer in the premises are irreparable, and that it is without adequate remedy at law.

All the matters and things in this bill of complaint set forth, as to the actions, doings and intentions of the defendants, are contrary to equity and good conscience, and tend to the manifest wrong and injury of the plaintiff.

In consideration whereof, and for as much as the plaintiff is remediless in the premises at and by the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable or relievable, plaintiff prays your Honors to grant unto it a writ of subpoena, to be directed to each of the defendants herein, commanding them, in conformity with the practice of this Honorable Court, to appear herein and answer this bill of complaint, (but not under oath, and answer under oath being expressly waived); that the defendant, David S. Creamer, Treasurer of State, be temporarily enjoined from certifying the plaintiff to the defendant, Edward M. Fullington, Auditor of State, as delinquent, and that the defendant, Edward M. Fullington, Auditor of State, be temporarily enjoined from receiving such certification and from adding any penalty to said tax charged against the plaintiff or preparing any duplicate or report thereof; that the defendants, Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission

17 of Ohio, be temporarily enjoined from certifying to the Secretary of State that the plaintiff has failed to pay said tax on said penalty, and that they and the defendant, Timothy S. Hogan Attorney General, and each of them, be temporarily enjoined from taking any steps toward the collection or enforcement of said tax or said penalty, or the cancellation of plaintiff's articles of incorporation, or otherwise interfering with it or its business, by reason of its failure to pay said tax or said penalty, and that their several servants, agents and employés be likewise so temporarily enjoined, and that upon final hearing said injunction be made perpetual and permanent, and said tax decree to be void; that a temporary restraining order issue forthwith; and for all such other relief as the plaintiff may be entitled to and as to this Hoeorable Court may seem mete; and plaintiff will ever pray.

F. A. DURBAN AND
ROBT. J. KING,
*Solicitors for Plaintiff.*

The Marietta, Columbus & Cleveland Railroad Company.

STATE OF OHIO,
*Muskingum County, ss:*

Robert G. Shorter, being duly sworn, deposes and says that he is the Auditor of the plaintiff, The Marietta, Columbus and Cleveland Railroad Company, which is a corporation, and is its officer and agent duly authorized in the premises; that he has read the foregoing bill of complaint; and that the facts stated therein are true, except such as are therein stated to be upon information and belief, and as to such facts affiant verily believes them to be true.

ROBERT G. SHORTER.

Sworn to before me and subscribed in my presence, this 9" day of December, 1911.

[SEAL.] FRANK P. HAINES,
*Notary Public.*

18 And afterwards, towit: on the 11th day of December, A. D. 1911, an Entry was made upon the Journal of said Court, in said cause, which said Entry is clothed in the words and figures following, towit:

*Entry (Tem. Restraining Order Allowed).*

In the United States Circuit Court for the Southern District of Ohio, Eastern Division. In Equity.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

DAVID S. CREAMER, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Journal Entry.

This day this cause came on to be heard upon the application of the plaintiff for a temporary restraining order herein, the defendants having been duly notified of the application therefor; on consideration whereof the Court, being fully advised in the premises, finds that said temporary restraining order should be granted, as prayed for.

It is, therefore, ordered, adjudged and decreed that upon giving bond in the sum of $5,000.00, with surety approved by the Court, the defendant, David S. Creamer, Treasurer of State, be and he is hereby restrained from certifying the plaintiff to the defendant, Edward M. Fullington, Auditor of State, as delinquent; and the defendant, Edward M. Fullington, Auditor of State, be and he is hereby restrained from receiving such certification and from add-

ing any penalty to said tax charged against the plaintiff, or
19 preparing any duplicate or report thereof; and the defendants, Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and each of them, and The Tax Commission of Ohio, be and they are restrained from certifying to the Secretary of State that the plaintiff has failed to pay said tax or said penalty; and that they and the defendant, Timothy S. Hogan, Attorney General, and each of them, be and they are restrained from taking any steps toward the collection or enforcement of said tax or said penalty, or the cancellation of plaintiff's articles of incorporation, or otherwise interfering with it or its business, by reason of its failure to pay said tax or said penalty, and that *there* several agents, servants and employés be likewise so restrained; and that the defendants be restrained as prayed for in the petition.

This order shall be in full force and effect until ten A. M., January 15, 1912, at which time this cause to be heard on application for temporary injunction; but if for cause case is not heard at above named hour, this restraining order shall continue in force and effect until this Court shall rule on application for temporary injunction.

And afterwards, towit: on the 11th day of December, A. D. 1911, there was filed in the Clerk's Office of said Court a certain Restraining Order Bond in this cause, which said Restraining Order Bond is clothed in the words and figures following towit:

*Restraining Order Bond.*

THE UNITED STATES OF AMERICA,
*Southern District of Ohio, ss:*

Restraining Order Bond.

Know All Men by These Presents: That The Marietta, Columbus and Cleveland Railroad Company and The American Surety Company are held and firmly bound unto David S. Creamer, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and
20 Christian Pabst as The Tax Commission of Ohio and The Tax Commission of Ohio in the sum of five thousand dollars ($5,000.00) to the payment of which they bind themselves, and their successors firmly by these presents.

Sealed with our seals, and dated this 11th day of December, A. D. 1911.

The condition of the above obligation is such, that Whereas, said The Marietta, Columbus and Cleveland Railroad Company, a citizen of the State of Ohio, as plaintiff having filed on the Chancery side of the Circuit Court of the United States for the South-

ern District of Ohio, a Bill against the said David S. Creamer, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio, Timothy S. Hogan, Attorney General of the State of Ohio, Robert M. Dittey, Frank E. Munn and Christian Pabst as The Tax Commission of Ohio and The Tax Commission of Ohio and having obtained an allowance of a temporary restraining order as prayed for in said Bill, from the certifying by said Creamer, Treasurer of the plaintiff, to said Fullington, Auditor, as delinquent in payment of the so called excise tax for the privilege of carrying on intra-state business, and from the receiving of such certification by said auditor or the adding by him of any penalty to said tax, or preparing any duplicate thereof and from the certifying of plaintiff as delinquent to the Secretary of State by the Defendants, Dittey, Munn and Pabst as The Tax Commission of Ohio or The Tax Commission of Ohio and from the taking of any steps for the collection or enforcement of said tax or penalty by the said Dittey, Munn and Pabst as The Tax Commission of Ohio, or the Tax Commission of Ohio of said Attorney General, as more fully appears in said restraining order. Now if the said The Marietta, Columbus and Cleveland Railroad Company, shall abide the decision of said Court and pay all moneys and costs which shall be adjudged against it in case the said restrain-
21 ing order shall be dissolved, then these presents shall be void: otherwise to remain in full force.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, [SEAL.]
By R. G. SHORTER, *Its Auditor.*
AMERICAN SURETY COMPANY OF NEW YORK,
By R. I. ZIMMERMAN, *Res. Vice Pres.*

Signed and sealed in presence of
F. A. HIGHT.

Attest:
ARTHUR D. MURPHY,
*Res. Ass't Sec'y.*

Thereupon there was issued out of the Clerk's Office of said Court, our certain Temporary Restraining Order in this cause, directed to the Marshal of said District and against said Defendants which said Temporary Restraining Order is clothed in the words and figures following, towit:

*Temporary Restraining Order.*

THE UNITED STATES OF AMERICA,
*Southern District of Ohio, Eastern Division, ss:*

The President of the United States of America, to David S. Creamer, Treasurer of State of the State of Ohio, Edward M. Fullington, Auditor of State of the State of Ohio, Timothy S. Hogan, Attorney General of the State of Ohio, Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and the Tax Commission of Ohio, Greeting:

Whereas The Marietta, Columbus and Cleveland Railroad Company, a corporation under the laws of Ohio, citizen of the State of Ohio has filed on the Chancery side of the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio, a bill against David S. Creamer, Treasurer of State of the State of Ohio, Edward M. Fullington, Auditor of State of the State of Ohio, Timothy S. Hogan, Attorney General of the State of Ohio, Robert M. Dittey, Frank E. Munn, and Christian Pabst, as
22 The Tax Commission of Ohio and The Tax Commission of Ohio, and has obtained an allowance for a temporary restraining order, as prayed for in said Bill, from Hon. Howard C. Hollister, U. S. District Judge sitting and holding U. S. Circuit Court.

Now, Therefore, we having regard to the matters in said Bill contained, do hereby command and strictly restrain you, the said David S. Creamer, Treasurer of State from certifying the plaintiff to the defendant, Edward M. Fullington, Auditor of State, as delinquent, under the four per cent excise tax law; and you the defendant, Edward M. Fullington, Auditor of State from receiving such certification and from adding any penalty to said tax charged against the plaintiff, or preparing any duplicate or report thereof; and you the defendants, Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and each of you, and you The Tax Commission of Ohio, from crtifying to the Secretary of State that the plaintiff has failed to pay said tax or said penalty; and you and the defendant, Timothy S. Hogan, Attorney General, and each of you, from taking any steps toward the collection or enforcement of said tax or said penalty, or the cancellation of plaintiff's articles of incorporation, or otherwise interfering with it or its business, by reason of its failure to pay said tax or said penalty, and your several agents, servants and employés are likewise so restrained; and you the defendants are restrained as prayed for in the petition. This order shall be in full force and effect until ten A. M. January 15th, 1912, at which time this cause is to be heard on application for temporary injunction; but if for cause case is not heard at above named hour, this restraining order shall continue in force and effect until this Court shall rule on application for temporary injunction.

23 Which commands and injunctions you are respectively required to observe and obey, until our said Circuit Court shall make further order in the premises.

Hereof fail not, under the penalty of the law thence ensuing.

Witness, The Honorable Edward D. White, Chief Justice of the United States, this 11th day of December, 1911, and in the 136" year of the Independence of the United States of America.

[SEAL.] B. E. DILLEY, *Clerk*,
*U. S. Circuit Court, S. D. O.*,
By F. A. HIGHT, *Deputy*.

Thereupon there was issued out of the Clerk's Office of said Court, our certain Subpœna in this cause, directed to the Marshal of said District and against said Defendant which said Subpœna is clothed in the words and figures following, towit:

*Subpœna.*

UNITED STATES OF AMERICA,
*Southern District of Ohio, Eastern Division, ss:*

The President of the United States of America to the Marshal of the Southern District of Ohio, Greeting:

You are hereby commanded to summon David S. Creamer, Treasurer of State of the State of Ohio, Edward M. Fullington, Auditor of State of the State of Ohio, Timothy S. Hogan, Attorney General of the State of Ohio, Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, citizens of and resident in the State of Ohio, if they be found in your District, to be and appear in the Circuit Court of the United States for the Eastern Division of the Southern District of
24 Ohio, aforesaid, at Columbus, on the first Monday in March next, to answer a certain Bill in Chancery, filed and exhibited in said Court, against them by The Marietta, Columbus and Cleveland Railroad Company, a corporation organized under the laws of Ohio, citizen of and resident in the State of Ohio.

Hereof you are not to fail under the penalty of the law thence ensuing. And have you then and there this writ.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 11th day of December, A. D., 1911, and in the 136th year of the Independence of the United States of America.

[SEAL.] B. E. DILLEY, *Clerk*.
Attest:

*Memorandum.*

The said defendants are required to enter their appearance in this suit in the Clerk's Office of said Court on or before the first Monday of February, 1912, otherwise the said bill may be taken pro confesso.

B. E. DILLEY, *Clerk*.

And afterwards, towit: on the 15th day of December, A. D. 1911, came the Marshal of said District to whom the said writ was in form aforesaid directed and returned the same into the Clerk's Office of said Court with his proceedings endorsed thereon, clothed in the words and figures following, towit:

*Marshal's Return (Temporary Restraining Order).*

Received this writ at Columbus, Ohio, on December 11, 1911, and on the same day I served the within named David S. Creamer, Treasurer of State of the State of Ohio, by delivering to him
25 a true copy of this writ, with the endorsements thereon, by handing same to him personally, at Columbus, Ohio.

And on December 12, 1911, I served the within named Edward M. Fullington, Auditor of State of the State of Ohio, by delivering to him a true copy of this writ, with the endorsements thereon, by handing same to him personally, at Columbus, Ohio.

And on December 12, 1 served the within named Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, by delivering to each personally a true copy of this writ, with the endorsements thereon, by handing same to each personally, at Columbus, Ohio.

And on December 12, 1911, I served the within named The Tax Commission of Ohio by delivering a true copy of this writ, with the endorsements thereon, to Robert M. Dittey, Chairman of said Commission, by handing same to him personally, at Columbus, Ohio.

And on December 13, 1911, I served the within named Timothy S. Hogan, Attorney General of the State of Ohio, by delivering to him a true copy of this writ, with the endorsements thereon, by handing same to him personally, at Columbus, Ohio.

EUGENE L. LEWIS,
*U. S. Marshal, S. D. O.,*
By W. J. SANDERSON, *Deputy.*

Total Fees: $16.50.

And afterwards, towit: on the 15th day of December, A. D. 1911, came the Marshal of said District to whom the said writ was in form aforesaid directed and returned the same into the Clerk's Office of said Court with his proceedings endorsed thereon, clothed in the words and figures following, towit:

26 *Marshal's Return (Subpœna).*

U. S. Marshal's Return.

Received this writ at Columbus, Ohio, on December 11, 1911 and on the same day I served the within named David S. Creamer, Treasurer of State of the State of Ohio, by delivering to him a true copy of this writ, with the endorsements thereon, by handing same to him personally, at Columbus, Ohio.

And on December 12, 1911, I served the within named Edward M. Fullington, Auditor of State of the State of Ohio, by delivering to him a true copy of this writ, with the endorsements thereon, by handing same to him personally, at Columbus, Ohio.

And on December 12, 1911, I served the within named Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, by delivering to each personally a true copy of this writ, with the endorsements thereon, by handing same to each personally, at Columbus, Ohio.

And on December 12, 1911, I served the within named The Tax Commission of Ohio by delivering a true copy of this writ, with the endorsements thereon, to Robert M. Dittey, Chairman of said Tax Commission, by handing same to him personally, at Columbus, Ohio.

And on December 13, 1911, I served the within named Timothy S. Hogan, Attorney General of the State of Ohio, by delivering to him a true copy of this writ, with the endorsements thereon, by handing same to him personally, at Columbus, Ohio.

EUGENE L. LEWIS,
*U. S. Marshal, S. D. O.,*
By W. J. SANDERSON, *Deputy.*

Total Fees: $16.34.

27 And afterwards, towit: on the 15th day of January, A. D. 1912, an Entry was made upon the Journal of said Court in said cause, which said Entry is clothed in the words and figures following towit:

*Entry (Restraining Order to Continue in Force).*

In the United States Circuit Court for the Southern District of Ohio, Eastern Division. In Equity.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

DAVID S. CREAMER, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Journal Entry.

For cause duly shown, the plaintiff's application for a temporary injunction herein is not heard at ten A. M. January fifteenth, 1912, and accordingly the restraining order heretofore issued herein continues in force and effect until this Court shall hear and rule upon such application for a temporary injunction.

And afterwards, towit: on the 23rd day of July, A. D. 1912, an

Entry was made upon the Journal of said Court, in said cause, which said Entry is clothed in the words and figures following, towit:

28 *Entry (Leave to File Demurrer).*

No. 1600.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, Plaintiff,
vs.
DAVID S. CREAMER, Treasurer of State, et al., Defendants.

Entry.

Upon application and for good cause shown, leave is granted the Defendants to file their Demurrer in this cause, and same is accordingly filed.

And afterwards, towit: on the 23rd day of July, A. D. 1912, came the Defendants, by their Attorneys, and filed in the Clerk's Office of said Court, their Demurrer in this cause, which said Demurrer is clothed in the words and figures following, towit:

*Demurrer.*

In the District Court of the United States, Southern District of Ohio, Eastern Division.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
DAVID S. CREAMER, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission, and the Tax Commission of Ohio, Defendants.

Demurrer of the Above-named Defendants, David S. Creamer, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission, and The Tax Commission of Ohio to the Bill of Complaint of the Above-named Plaintiff.

The defendants by protestation not confessing or acknowledging all or any of the matters or things in said Bill of Complaint
29 contained to be true, in such manner and form as the same are therein set forth and alleged, do demur to the said Bill

and to each and every paragraph thereof. And for cause of demurrer show that it appears by the plaintiff's own showing by the said Bill that it is not entitled to the relief prayed by the Bill against these defendants.

Wherefore, and for divers other causes of demurrer appearing from said Bill, these defendants do demur thereto, and pray the judgment of this Honorable Court whether they shall be compelled to make any answer to said Bill, and they humbly pray to be hence dismissed with the reasonable costs in this behalf sustained.

TIMOTHY S. HOGAN,
*Attorney General of Ohio, Solicitor for the Defendants.*

CLARENCE D. LAYLIN,
*Of Counsel.*

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

TIMOTHY S. HOGAN,
*Attorney General of Ohio, Solicitor for the Defendants.*

STATE OF OHIO,
*Franklin County, ss:*

Robert M. Dittey, being duly sworn, deposes and says that he is a member of and Chairman of The Tax Commission of Ohio, and is one of the above-named defendants, and that the foregoing demurrer is not interposed for delay.

ROBERT M. DITTEY.

Sworn to before me and subscribed in my presence this 20th day of July, A. D. 1912.

[SEAL.] A. J. SMART,
*Notary Public within and for Franklin County, Ohio.*

30 And afterwards, towit: on the 5th day of October, A. D. 1912, an Entry was made upon the Journal of said Court, in said cause, which said Entry is clothed in the words and figures following, towit:

*Entry (Case Set for Hearing November 26, 1912).*

United States District Court, Southern District of Ohio, Eastern Division.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, Complainant,

vs.

DAVID S. CREAMER, Treasurer of the State of Ohio, Defendant.

*Order.*

The complainant having filed in this Court its bill against the defendant, alleging that the law under which such Treasurer is operating is in certain respects unconstitutional and praying for a permanent injunction on the final hearing, and has also applied for an interlocutory injunction pending such hearing.

Now, therefore, in pursuance of Section 266 of the Judicial Code of the United States, I do hereby call to my assistance, for the purpose of hearing and determining such application and such case on its merits, if counsel be ready thus to present the same, the Honorable John W. Warrington, United States Circuit Judge for the Sixth Judicial Circuit, and the Honorable William L. Day, United States District Judge for the Northern District of Ohio,—such hearing to be had in the Court Room in the Federal Building at Columbus, Ohio, on November twenty-sixth, 1912, at ten o'clock A. M.

31 It is further ordered that counsel for the respective parties to such action be present, to present such case at the time above named on the appliaction for an interlocutory injunction or on the merits, as they may elect and circumstances permit.

J. E. SATER,
*United States District Judge.*

And afterwards, towit: on the 15th day of February, A. D. 1913, there was filed in the Clerk's Office of said Court a certain Opinion in this cause, which said Opinion is clothed in the words and figures following, towit:

*Opinion.*

United States District Court, Southern District of Ohio, Eastern Division.

No. 1593.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

ROBERT M. DITTEY, FRANK E. MUNN, and CHRISTIAN PABST, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

No. 1600.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

DAVID S. CREAMER, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

On Plaintiff's Application for Interlocutory Injunction and Defendants' Demurrer.

Before Warrington, Circuit Judge, and Sater and Day, District Judges.

*Per Curiam:*

Jurisdiction of these cases is vested in this Court through the presence of certain federal questions, no matter how it shall be found necessary to decide them or whether to decide them at all. Siler v. Louisville & Nashville, R. R. Co., 213 U. S., 175; Mich Cent. R. R. Co. v. Vreeland, decided by U. S. Supreme Court, January 20, 1913; L. & N. R. Co. v. Siler, 186 Fed. Rep., 176.

33 The plaintiff in each of the cases is an Ohio corporation, whose line or road lies wholly within the state. In each case the plaintiff challenges the constitutionality of certain sections of the Act of May 31, 1911, 192 Ohio L., 224-260, creating a tax commission and providing for a system of taxation, and imposing a sum which the Act recites is in the nature of an excise tax upon the privilege of carrying on intra-state business. A restraining order having been granted in each case, the respective plaintiffs seek a temporary injunction. The defendants, who are certain state officers and members of the tax commission, demur to each of the bills. The cases are for hearing on the plaitniffs' application for an

interlocutory injunction and upon the demurrers of the defendants.

The law under consideration is a re-enactment of the Act of March 10, 1910. Its history is contained in the brief filed in behalf of the State, but its development need not be traced. The Act raises the rate of the so-called excise taxation on certain utilities, substitutes a tax commission for a board of appraisers and assessors, assembles the various tax laws of the state and incorporates them into one measure.

The term "public utility," as used in the Act and as defined in Sec. 39, means and embraces each corporation, company, firm, individual and association, their lessees, trustees, or receivers elected or appointed by any authority whatsoever, referred to in such section,—a railroad company being one of the many kinds of companies therein mentioned and includes also any plant or property owned or operated, or both, by any such companies, corporations, firms, individuals or associations. By the provisions of Sec. 40, any person or persons, firm or firms, copartnership or voluntary association,
joint stock association, company or corporation, wherever
34 organized or incorporated, when engaged in the business of operating a railroad, either wholly or partially within the state, on rights of way acquired and held exclusively by such company, or otherwise, is a railroad company.

Section 42 defines the term "gross earnings" "to mean and include the entire earnings for business done by any person or persons, firm or firms, copartnership or voluntary association, joint stock, association, company or corporation, wherever organized or incorporated, from the operation of any public utility, or incidental thereto, or in connection therewith. The gross earnings for business done by an incorporated company, engaged in the operation of a public utility, shall be held to mean and include the entire earnings for business done by such company under the exercise of its corporate powers, whether from the operation of the public utility itself or from any other business done whatsoever."

Sec. 83 requires a statement to be filed by each railroad company with the Tax Commission containing the entire gross earnings, including all sums earned or charged, whether actually received or not, for the year ending on the 30th day of June next preceding, from whatever source derived, for business done within the state, excluding therefrom, however, all earnings derived wholly from interstate business or business done for the federal government. The statement must also contain the total gross earnings of such company for such period from business done within the state. By the terms of Sec. 97, the Auditor of State in the month of November is required to charge for collection against each railroad company a sum in the nature of an excise tax for the privilege of carrying on its intra-state business. The amount so charged is four per cent, and is computed on the gross earnings, as fixed and reported to him by the Commission, of the company's intra-state business for the year covered by its annual report to such Commission, but the tax shall not be less than ten dollars in any case. The various public utilities

named in the Act are classified. The percentage charged for collection as an excise tax for the privilege of carrying on
35 intra-state business is the same as to all utilities falling within any given class, but varies as among different classes,. The tax imposed for instance on railroad companies for such privilege is, as we have seen, four per cent. of the gross earnings of their intra-state business, to the exclusion of the earnings derived wholly from interstate business and business done for the federal government (Sections 46, 72, 83, 88, 93, 97), while that assessed for a like purpose against the similar earnings of street, suburban and interurban railroad companies is but 1.2%, and of express and telegraph companies 2%.

While the mere declaration of the General Assembly that the tax is an excise tax not make it so, if it is apparent that it cannot be consistently so designated, nevertheless the declaration of the law-making body is entitled to much weight. Flint v. Stone Tracy Co., 220 U. S., 107, 145. In view of the decisions, state and federal, it is plain that the tax in question is an excise tax on the doing of corporate intra-state business, the gross intra-state business being the yardstick or measure of taxable value. Southern Gum Co. v. Laylin, 66 Ohio St., 578; State v. Ferris, 53 Ohio St., 314; Ashley v. Ryan, 49 Ohio St., 504; Western Union Telegraph Co. v. Mayer, 28 Ohio St., 521; Express Co. v. State, 55 Ohio St., 69; Adler v. Whitbeck, 44 Ohio St., 539; Thomas v. U. S., 192 U. S., 363; Cooley, Const. Lim. 6th ed., 608.

Each plaintiff contends that, because it is unable to earn upon its investment a reasonable profit attributable to intra-state business, it possesses no privilege worth four per cent. of its gross intra-state earnings and that such a tax is as to it both confiscatory and discriminatory. The Ohio River & Western Railway Company alleges that a tax of four per cent. of its gross intra-state earnings
36 is excessive, because, though carefully managed, it does not produce, without the imposition of such tax, a profit equal to the return upon high grade investments at all times available in the money market. The Marietta, Columbus & Cleveland Railway Company charges that it is actually operated at a loss. Are the plaintiffs or either of them for the reasons stated exempt from the excise tax in question? It was held in State v. Ferris, p. 341, and is conceded by the plaintiffs, that the first section of the fourteenth amendment to the constitution of the United States, which provides that no state shall "deny to any person within its jurisdiction the equal protection of its laws" is no broader than the second section of the Ohio bill of rights, and that therefore a statute relating to an excise tax authorized by the bill of rights would not conflict with such section of the constitution of the United States; but the plaintiffs, to maintain their contention, point to the following language in Southern Gum Co. v. Laylin, pp. 578, 594:

"But upon the power to tax privileges and franchises there is no express limitation in the constitution, but certain limitations upon that power must be implied from other provisions of the constitution, so as to make the whole instrument harmonious and consistent

throughout. The constitution was established to 'promote our common welfare.' Preamble to the Constitution. Government is instituted for the equal protection and benefit of the people. Section 2 of the Bill of Rights. Private property shall ever be held inviolate, but subservient to the public welfare. Section 19 of the Bill of Rights. These provisions of the constitution are implied limitations upon the power of taxation of privileges and franchises, and limit such taxation to the reasonable value of the privilege or franchise conferred originally, or to its continued value from year to year. Ashley v. Ryan, 49 Ohio St., 504, State v. Ferris, 53 Ohio St., 314, and Hagerty v. State, 55 Ohio St., 613, are examples of taxing the privileges or franchise conferred; while Telegraph Co. v. Mayer, 28 Ohio St., 521, and Express Co. v. State 55 Ohio St., 69, are examples of taxing the continued value of the existing privilege or franchise from year to year.

These limitations prevent confiscation and oppression under
37 the guise of taxation, and the power of such taxation cannot be extended beyond what is for the common or public welfare, and the equal protection and benefit of the people; but the ascertaining and fixing of such values rest largely in the General Assembly, but finally in the courts."

An examination of that case as reported, as well as of the original file papers, discloses that no contention was made and no issue tendered that the statute then under consideration imposed a tax beyond the reasonable value of the privilege or franchise originally conferred or its continued value from year to year, nor do any of the cases cited in the above quoted excerpt touch that question. The limitation thus to be imposed by the state constitution on the legislative power to tax cannot, however, be safely treated as a dictum, for the reason that it is carried forward into the syllabus, which in Ohio states the law of the case. The Court dealt in that case with a general law and its operation on all corporations of given classes throughout the state, and not with its operation on specific financially weak corporations of any one of those classes. It did not consider the same question as is here presented, and we are constrained to believe that it did not mean to hold that the courts, as final arbiters, may overthrow a law which imposes a tax on privileges and franchises merely because in isolated cases such law imposes a hardship, but that it had reference to a law the effect of whose enforcement is to produce that result generally. This is made clear by the same court in State v. Guilbert, 70 Ohio St., 253, where it is said:

"We are of the opinion that an excise tax which operates uniformly throughout the state and applies equally to all the subjects embraced within its terms, cannot be said to deprive any of the equal protection of the law, or in any manner to violate the bill of rights, or any section of the constitution."

The earlier case of Western Union Telegraph Co. v. Mayer, 28 Ohio St., 521, is also instructive. A law of uniform operation, which imposed an excise tax at a rate equal to that on property,
38 on the gross receipts of foreign express and telegraph companies doing business in Ohio and prohibited, under heavy

penalties, any person from acting as agent of or transacting any business for any company that defaulted in the payment of such tax, was alleged to be violative of both the state and federal constitution. The tax was a charge on the privilege of such corporations exercising their franchises and powers within the state until the tax, interest and penalties thereon were fully paid. It was computed on the gross receipts arising manifestly not only from distinctively intra-state business, but from business which began elsewhere and terminated within the state, or had its inception in the state and terminated beyond its limits. Thus reckoned, the amount was 3.34% of such receipts, but if restricted as it should have been to the purely intra-state business, it equalled 31.2% of the total receipts from that source, or 93.6% of such receipts not absorbed by current expenses. It was charged that the tax was oppressive and unjust in its operation, but the tax was upheld, it being stated in the opinion regarding its provisions that——

"They are the conditions upon which corporations named in the act are allowed to do business within the state. Whether this tax is warranted by a wise public policy, or whether it is too onerous, are questions for the legislature and not for the courts. The burden is the price paid for transacting their business within the state. Any regulations imposed on such corporations, not amounting to a regulation of commerce, nor a tax on the property of the corporation within the state, imposed as a compensation to be paid to the state for the privilege of doing business within its territory, is, we think within the legislative power of the general assembly. The unbroken current of judicial authority is in support of such power in the state, and in our opinion public policy demands its exercise."

The Court, it is true, was speaking of a law affecting foreign corporations only which could exercise none of their powers or franchises within the state, save through comity or under
39 legislative consent, and which the court found might have been excluded from the state altogether, with which theory we have nothing to do. But it is also true that it recognized the power to raise the necessary funds to defray the legitimate expenses of government by modes other than an ad valorem system of taxation on all property in the state and the legislative power to create domestic corporations and prescribe the terms upon which they, as well as foreign corporations, might exercise their franchises. The right to extend the tax to domestic corporations undoubtedly existed, as was later held in the Southern Gum Company case, but the legislature did not see fit to embrace such corporations within the law. It would therefore seem to follow that the language quoted is applicable to domestic as well as foreign corporations and that a law which, being of uniform operation, although it levied a charge almost equal to the entire net and distinctively intra-state profits of an individual corporation of a given class, is not, on that account, repugnant to any constitutional provisions, state or federal.

Some assistance is derived from Adler v. Whitbeck, 44 Ohio St., 539, which arose under a law the authority for whose enactment in based both upon the constitutional provision (Schedule, Sec. 18,

Constitution of Ohio) that "no license to traffic in intoxicating liquors shall hereafter be granted in this state, but the General Assembly may by law provide against evils resulting therefrom," and the power of taxation granted in the same organic instrument. The law imposed a tax on the business of trafficking in intoxicating liquors and involved the exercise of both the police power (p. 563, and McGuire v. State, 42 Ohio St., 532) and the power to tax (pp. 562, 568, Anderson v. Brewster, 44 Ohio St., 583). It served a double purpose—the restraint of the evils resulting from the liquor traffic, and the creation of a revenue to indemnify the general
40 taxpayer for the increased burden imposed on him by the business. The tax was said to be in the form and nature of a tax upon the business (p. 563), and in the Southern Gum Company case it is affirmatively characterized as an excise tax applied to the liquor traffic on account of the additional burdens imposed on the state. In this respect it is assimilated to the tax here under consideration, whose object is to compensate the state and indemnify the taxpayer for the increased burden resulting from the special inconvenience and expenses sustained and supervisory power exercised by the government over corporate public utilities and for the benefit of those who own and operate such. Ashley v. Ryan, 49 Ohio St. 504, 525; Cincinnati Gaslight & Coke Co. v. State, 18 Ohio St., 238, 243; Baker v. Cincinnati, 11 Ohio St., 534, 543; Southern Gum Co. v. Laylin, p. 595; Western Union Telegraph Co. v. Mayer. The contention was made in the Adler case that the enforced payment of the tax on the business of trafficking in intoxicating liquors would impose on many of small means such financial hardship as to drive them out of business. The court recognized that such would be the consequence, but it did not deem the law invalid on that account (pp. 560, 561, 567), as such result would arise from extraneous circumstances and not from the law.

Equality in regard to taxation of property is the great idea of the Ohio Constitution. Baker v. Cincinnati, 11 Ohio St., 541. The legislature, conforming as nearly as may be to the purposes of the framers of the constitution, has intended to reach, for taxation, the property of every citizen, whatever its form may be, which is not by the organic law specifically exempt, to the end that all shall bear their just share of the public burdens. Lewis v. State, 69 Ohio St., 479; Southern Gum Co. v. Laylin, p. 593. There can be no exemption of property from taxation, unless the right of exemption is clearly expressed. Lander v. Burke, 65 Ohio St., 532,
41 542. The estate of an insolvent decedent must contribute, and to the same relative extent as a prosperous enterprise or the estate of a wealthy decedent. Sec. 2734, R. S. McNeill v. Hagerty, 51 Ohio St., 255, 265. The creditors of an insolvent's estate really pay the tax, just as the bondholders and other creditors of the money losing plaintiff, under the rule of equality, in fact must do, if it be required to pay the excise tax charged against it. But absolute equality and uniformity is not attainable under the Ohio or any other system of taxation. An approximation thereto is all that is practicable. Shotwell v. Moore, 45 Ohio St., 646; Ashley v. Ryan, 49 Ohio St., 525, 526. Judge Cooley, in his work on Taxa-

tion, 3rd ed., 390, 391, with great force and accuracy, in speaking on this subject, says:

"It cannot be too distinctly borne in mind that any possible system of tax legislation must inevitably produce unequal and unjust results in individual instances; and if inequality in result must defeat the general law, then taxation becomes impossible, and governments must fall back upon arbitrary exactions. But no such impracticable principle is recognized in revenue laws. While equality and justice are constantly to be aimed at, impossibilities are not demanded. Tax legislation must be practical. * * * The legislature must judge of the general result, and when the law has apportioned the tax, individual hardships must be regarded as among the inconveniences which are incident to regular government. The same necessity that justifies any taxation will justify and sustain any reasonable provisions for giving it effect. The necessity of the state and of reasonable provisions for the security of the individual must be equally considered; the state is no more to be deprived of its revenue, because of individual hardships resulting from general rules, than is an individual to be stripped of his property without law, because in its necessity the state finds it more convenient to take it thus, than by regular proceedings. The incidental hardship or inconvenience must be submitted to in either case."

The rule of non-exemption on account of the impracticability of absolute equality of taxation thus recognized by the state court and so clearly stated by Judge Cooley, was applied and enforced as to an excise tax in Marmet v. State, 45 Ohio St., 69, where Judge
42 Spear, speaking for the court, held that absolute equality of burdens, whether applied to taxes or other subjects of legislation, is not to be expected in our laws, and that the wisdom of man has not yet devised a system of equalizing burdens so perfect in its application and so thorough in its enforcement as to leave no room for adverse comment or criticism. An excise tax is not a tax on property, State v. Ferris, p. 326, Cincinnati Gaslight & Coke Co. v. State, p. 243, State v. Hipp, 38 Ohio St., 225, Ashley v. Ryan, 49 Ohio St. 504, 525, but it must, to be valid, operate with equality and uniformity, unaffected by any questions as to the solvency or insolvency of the person that is required to pay. That the rule announced in the Marmet case persists appears from Ashley v. Ryan, pp. 525, 526, and State v. Ferris. In the Ferris case, an inheritance tax law providing for an excise tax on the right to receive property was overthrown, because it violated the rule of equality and did not afford to all upon whom its provisions operated equal protection and benefit. It was said (pp. 337, 338):

"Our constitution requires equality in our tax laws, and also equality in their execution as near as may be. The only exemption allowed, as to taxation of property, is personal property to the amount of two hundred dollars to each individual, and certain other property devoted to public or charitable uses. Two hundred dollars in value to each individual is the extent to which the legislature has the power to exempt personal property from taxation. The constitution must be regarded as consistent with itself throughout, and as Section 2, of article 12, permits an exemption from taxation of

personal property not exceeding two hundred dollars, a construction of section 2 of the bill of rights is thereby evinced to the effect that in taxation of subjects other than property, an exemption up to two hundred dollars in value would be regarded as for the equal protection and benefit of the people. The exemption must be equally for all, and the rate per cent must be the same on all estates. There can be no discrimination in favor of the rich or poor. All stand upon an equality under the provisions of the constitution, and it is this equality that is the pride and safeguard of us all."

The above announcement is in harmony with the utterances of the federal courts. In State Railroad Tax Cases, 92 U. S.,
43 575, a law was under consideration which imposed a tax on the franchise, capital stock, business and profits of the complaining corporations. One of the corporations was insolvent and in the hands of a receiver, its earnings not being sufficient to pay any of the interest on its bonded debt or anything beyond its necessary expenses for operation and repairs. Another of the companies met all of its expenses and interest on a large debt and declared large dividends. Each owned a large amount of tangible property and each possessed a franchise which it was held, as in Ashley v. Ryan, p. 525, to be valuable. They were both said to be alike subject to the law for the reason that insolvent corporations could no more escape taxation than insolvent individuals, many of whom pay taxes on realty which is mortgaged in excess of the value of all their property, both real and personal, the court adding that no state has ventured to establish the principle of permitting its visible tangible property to escape taxation, relying solely on a tax imposed on the individual on the basis of his estimated wealth in excess of his debts. In speaking of the insolvent company, Mr. Justice Miller said:

"Concede for the present that the capital stock is sunk and is of no value; concede that the funded debt of the company has at present no market value, or is unsalable,—there remains what is valued as worth over $2,600,000 of real and personal property, which, like all other property of individuals or corporations, ought to pay its proportion of the public burdens. There also remains the value of the franchise, which is not destroyed by the circumstance that the road does not pay interest on its debt. Does anybody believe that this debt is of no value,—that the holders of it attach no value to this franchise? Are they willing to give up the right to operate the road, to receive freights and fares, to endeavor to make it pay something more than the mere value of the personal property of the track, the depots, the grounds, the rolling-stock and other tangible property? Is it supposed by any one that they intend or will ever sell these separately or apart from the right to use them as a railroad? Why do not the bondholders sell all these things under their mortgage at auction as a man would sell town-lots and household furniture, and horses and carriages? The reason is too clear to escape observation. It is because in the case of the railroad there is attached to all this property, and goes with it, a privilege, a right to use it through the whole extent of the richest counties of
44 Illinois, in transporting persons and property, in a manner which adds immensely to its value when considered as so

much iron, so much land, and so much personal property. By virtue of this privilege or franchise, this is all aggregated into a unit, well adapted to make money by its use in that way, with a chartered right to use it for that purpose.

It is this franchise which the legislature of Illinois intended to tax, which it had a right to tax; and in taxing it committed no injustice, if it was fairly assessed, though the corporation which holds it may be so utterly bankrupt that it must necessarily pass from it into other hands. In those hands, disembarrassed of its overweight of debts, who shall say that it is not worth $2,000,000? And who shall say that such is not the real value now of this franchise?

See also Flint v. Stone Tracy Co., pp. 165, 167, 168. We think it can be confidently asserted that the Supreme Court of Ohio meant by the language employed in the Southern Gum Company case that only those excise tax laws, the result of whose operation is generally confiscatory and oppressive, are unconstitutional, and that it did not intend to say that a law, general and uniform in its operation, is invalid, because in exceptional cases it may impose a hardship.

The General Assembly was empowered to impose a tax on the gross receipts of the respective plaintiffs, Western Union Telegraph Co. v. Mayer, pp. 531, 540, State v. Reinmund, 45 Ohio St., 214, Express Co. v. State, 55 Ohio St., 69, 77, State Tax on Ry. Cross Receipts, 15 Wall., 284, and direct the application of the tax when collected to purposes of general revenue or any other purpose authorized by law. Ashley v. Ryan, p. 525; State v. Ferris, p. 314; State v. Guilbert, p. 254. Both of the plaintiffs require governmental protection and the exercise of its supervisory power, and each should in justice bear its fair share of the government's burden. Were either of them to escape taxation on account of its exceptional condition, all other unprofitable corporate enterprise would likewise be relieved, and thus a practical system of taxation would be rendered impossible and the state be deprived of the power to meet its legitimate expenses.

45 The claim that the law in question is discriminatory in that (1) it does not include all public utilities engaged in business in Ohio, and (2) does not operate uniformly among the utilities named, is not supported by either the state or federal decisions. The inheritance tax law under consideration in Hagerty v. State, 55 Ohio St., 613, providing for exemptions in the amount of two hundred dollars, was assailed as discrimatory as among collateral kindred, the tax being imposed upon the value of the property received by some and not upon that received by others. The law was sustained because the power exercised by the general assembly in the enactment of the law was legislative and vested by the legislative grant as expressed in the first section of the second article of the constitution, and as the right to receive property by inheritance is not guaranteed by the constitution, that instrument prescribed no limitation upon the power of the general assembly to designate the persons who may thus receive. The discrimination was based upon and held justified by the fact that there are degrees in collateral kinship. In commenting on that case in State v. Guilbert, the state

court approved the language employed in Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, regarding a similar law, that the states may tax the privilege of taking property by devise or descent, may discriminate between relatives, and between them and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective state constitutions regarding uniformity and equality in taxation. In the Guilbert case, which also involved an inheritance tax law, the conclusion was reached (and we understand it to be the statement of a rule applicable to excise taxes) that—

"When it is determined, as was determined in the Ferris case * * * that the tax is an excise tax, and as in the Hagerty case * * * that the authority to impose the tax is conferred by the general grant of legislative power, then the selection of the subjects on which the tax will be imposed must be within the legislative competency."

46 Many illustrations may be found in the statutes and reported cases of the rule thus announced. In Marmet v. State, an ordinance was upheld imposing a license fee on the owners of all vehicles used upon the streets of Cincinnati excepting farmers marketing the products of their own farms. In the Adler Case, the tax on the business of trafficking in liquors was sustained, although it did not bring within its provisions the manufacture of intoxicating liquors or the sale of them by the manufacturer in quantities of one gallon or more at any one time. The line was drawn between the distillery and the brewery on the one hand and the saloon on the other. In Western Union Telegraph Co. v. Mayer, a corporation franchise tax imposed on foreign express and telegraph companies and on no other public utility companies, was sustained. Section 2780-17, Rev. St., imposed an excise tax for state purposes only of one per cent. per annum upon the gross receipts of steam railroad, street and interurban railroad, express, telegraph and telephone companies when engaged in business either wholly or partially within the state, but it did not apply to water transportation companies unless the whole of their business was done within the state. Under the Nichols law (Sec. 2778*a*, R. S.), the property of express, telegraph and telephone companies was subjected to taxation, the value of such property being determined not merely by the consideration of the visible property, as in the case of all other corporations whose property, as in the case of all other corporations whose property is taxed, but by the value of the entire capital stock and by such other evidence and rules as will enable the boards fixing such valuation to arrive at the true value in money of the entire property of the companies in the state. A tax levied on such valuation was upheld in State v. Jones, 51 Ohio St. 492, and Adams Express Co. v. Ohio, 166 U. S., 185. Notwithstanding the establishment of the validity of that method of taxation, it was not extended to any other corporations in the state. The general assembly has seen fit to deter-

47 mine, in the enactment of the law now before us, what occupation or lines of industry are public service enterprises and invested with those attributes which pertain to public interest or

public service, but has exempted from the operation of the law, for instance, grain elevator companies, warehousing, stockyards, ferries, bridge companies and innkeepers, but it had a right so to do, and the selection made by it will not be disturbed by the courts unless the determination of the legislative body was clearly arbitrary. The law imposes no burden upon one class of utilities from which others similarly situated are exempt, and as it does not affect any right of the plaintiffs differently from that of others in the class to which they belong, it is not obnoxious to the constitution. Snell v. St. Ry. Co., 60 Ohio St., 269; State v. Guilbert, pp. 229, 245; 37 Cyc. 746. The same rule is recognized by the federal courts. In Kane v. Erie R. Co., 133 Fed. Rep., 681, 685, C. C. A. 6, in which a provision of an Ohio statute relating to railways was involved, it was said:

"The doctrine is well settled that the General Assembly, in the absence of an applicable prohibtion, has power to classify subjects of legislation, conferring rights or imposing burdens on the created classes, according to its views of what is just and expedient and will promote the general welfare, subject only to the limitation that there must be some reasonable ground for the classification made."

The rule so announced has been recognized in Magoun v. Illinois Trust & Savings Bank, supra, and in Home Ins. Co. v. New York, 134 U. S. 594, in each of which a statute was under consideration which involved an excis tax. Other cases in point are Kentucky Railroad Tax Cases, 115 U. S. 321; Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S. 232; Connolly v. Union Sewer Pipe Co., 184 U. S., 540; Brown-Forman Co. v. Kentucky, 217 U. S., 563; Southwestern Oil Co. v. Texas, 217 U. S., 114; Adams Express Co. v. Ohio, 165 U. S., 194, 228. The law is well expressed
48 in Bell's Gap Railroad Co. v. Pennsylvania (p. 237), where it is said:

"The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution."

In view of what has heretofore been said and authorities cited, it is clear that there is no merit in the contention that, because certain utilities of a given class pay one rate of tax and others of another class another rate, the law is wanting in uniformity of operation.

Another insistence is that the Act as applied to railroads lays a

burden on interstate commerce. The tax by express provision is levied on gross intra-state earnings only. Those derived wholly from interstate business and business done for the federal government are specifically excluded in computing the amount to be paid. The rule announced in Ratterman v. Western Union Tel. Co., 127 U. S., 424, 425, is that where the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the state will be permitted to collect that arising upon the latter. As the gross intra-state earnings can be readily separated from all others, the law is not open to the objection urged. Ratterman v. Express Co., 49 Ohio St., 618; Express Co. v. State, pp. 69, 81; Western Union Tel. Co. v. Kansas, 216 U. S., 1, 31, 32, Kehrer v. Stewart, 197 U. S., 60, 67.

49 The further charge is made that, inasmuch as plaintiffs each pay a property tax, the tax provided by the Act in question is not permissible in that it denies them the equal protection of the law by subjecting them to double taxation. McNeill v. Hagerty, 51 Ohio St., 255, 268; Collett v. Springfield Savings Soc., 13 Ohio C. C., 131, 137. This cannot be true, because the exaction of four per cent. of the gross intra-state earnings is not a property tax, but is an excise tax, the amount of which is fixed and measured by the amount of such earnings. Double taxation, in a legal sense, does not exist, unless the double tax is levied upon the same object within the same jurisdiction. Bradley v. Bauder, 36 Ohio St., 28, 35. The plaintiffs pay but one tax on property, and another as an excise tax. The taxation, therefore, is not double. Southern Gum Co. v. Laylin, p. 596.

The Act is also said to be unconstitutional in that it seeks to prevent judicial inquiry into its constitutionality and enforce obedience to its terms and the administrative acts thereunder, irrespective of their validity. To sustain this claim allusion is made to the provision for the recovery of a 15% penalty on unpaid taxes (Sec. 103), to the power to cancel the articles of incorporation of a delinquent corporation (Sec. 120), to the peanlty imposed on any one who shall exercise or attempt to exercise any powers, privileges or franchises under the articles of incorporation after the same are cancelled (Sec. 120), to the power to enjoin the transaction of any business by any delinquent public utility (Sec. 123), to each day's wilful failure to observe and comply with any order or direction of the Tax Commission or to perform any duty enjoined by law which the Tax Commission is authorized to administer, constituting a separate and distinct offense (Sec. 158), and to the provision that the holding of any section or part thereof void and ineffective shall not affect any other section or part thereof (Sec. 160). We are not concerned with the validity or operation of any of such

50 sections, for the reason that the pleadings tender no issue regarding them. Moreover, the penalties are clearly a separate part of the Act, and whether collectible or not, may be determined in a case involving an attempt to enforce them. Flint v.

Stone Tracy Co., p. 177; Willcox v. Consolidated Gas Co., 212 U. S., 53, 54.

We have noticed such objections as are made to the constitutionality of the law, as it is deemed necessary to consider. We do not find the statute to be obnoxious to either the state or the federal constitution.

It follows that the motion for an interlocutory injunction in each case must be denied. However, the questions involved are of such importance, that we assume that a review of our conclusions will be desired by the plaintiffs, pursuant to the special provision found in Sec. 266, Judicial Code, Act of March 3, 1911, 36 Stat., 1162.

We have accordingly concluded that the restraining orders heretofore granted shall be continued until an opportunity has been given for the plaintiffs to secure a review, and subject to conditions which will be prescribed in the order to be entered.

That the right of appeal directly to the Supreme Court from our decision may not be embarrassed, we refrain at the present time from passing upon the demurrers.

J. W. WARRINGTON,
*U. S. District Judge.*
J. E. SATER,
*U. S. Dist. Judge.*
WILLIAM L. DAY,
*U. S. District Judge.*

51 And afterwards, towit: on the 13th day of June, A. D. 1913, an Entry was made upon the Journal of said Court, in said Cause, which said Entry, is clothed in the words and figures following, towit:

*Entry (Injunction Refused).*

In the District Court of the United States, Southern District of Ohio, Eastern Division. In Equity.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

DAVID S. CREAMER, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Entry.

The plaintiff herein having made application for an interlocutory injunction herein suspending or restraining the enforcement and operation and execution of certain statutes of the State of Ohio by restraining the action of certain officers of said State, defendants herein, in the enforcement and execution of such statutes, and such

application having been presented to the Honorable John E. Sater, District Judge of said Court, in chancery sitting, and said District Judge thereupon having immediately called to his assistance to hear and determine said application, two other Judges of said Court, towit, the Honorable John W. Warrington, Circuit Judge of said Court, and the Honorable William L. Day, District Judge of said Court, and more than five days' notice of the hearing of said application having been given to the Governor and to the Attorney General of said State of Ohio and to the defendants herein, said application for an interlocutory injunction came on to be heard
52 before and by said three Judges of said Court, upon the verified bill of complaint of the plaintiff, the facts averred in which said bill of complaint were by the defendants, for the purpose of said application for an interlocutory injunction, and not otherwise, admitted to be true, and was argued by counsel for plaintiff and defendants; on consideration whereof the said Court, said three Judges sitting therein as aforesaid and concurring, find that said application for an interlocutory injunction is not well taken; and it is by the Court ordered that said interlocutory injunction asked for by the plaintiff as aforesaid be and it is hereby denied; to which finding of said Court and the denying of said interlocutory injunction plaintiff excepts. And the plaintiff thereupon gives notice of its intention to appeal from said order denying said interlocutory injunction, direct to the Supreme Court of the United States; and thereupon the Court fixes the appeal bond in the sum of five hundred ($500.00).

J. E. SATER, *D. J.*

Approved, this 27th day of May, 1913.

TIMOTHY S. HOGAN,
*Attorney General Attorney for Defendants.*

CLARENCE D. LAYLIN,
FRANK DAVIS, JR.,
*Of Counsel.*

And afterwards, towit: on the 25th day of June A. D. 1913, came the Plaintiff, by its Attorneys, and filed in the Clerk's Office of said Court, its Certain Petition for Appeal with Order allowing same endorsed thereon, in this cause, which said Petition for Appeal is clothed in the word and figures following, towit:

53 *Petition for Appeal.*

In the District Court of the United States, Southern District of Ohio, Eastern Division. In Equity.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

DAVID S. CREAMER, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Petition for Appeal.

The above named plaintiff, The Marietta, Columbus and Cleveland Railroad Company, a corporation, conceiving itself aggrieved by the decree made and entered on the 13th day of June, 1913, in the above entitled cause, wherein and whereby said plaintiff was denied, after notice and hearing, an interlocutory injunction in said cause, suspending or restraining the enforcement, operation and execution of the statutes of the State of Ohio, by restraining the action of certain officers of said State, towit, the defendants herein, in the enforcement or execution of such statutes, does hereby appeal from said order and decree denying said interlocutory injunction, as aforesaid, to the Supreme Court of the United States, for the reason specified in the assignment of errors which is filed herewith; and prays that this appeal may be allowed and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

F. A. DURBAN &
ROB'T J. KING,
*Attorneys for Plaintiff.*

Dated this 14th day of June, 1913.

The foregoing claim of appeal is allowed, and bond is fixed at $500.00.

J. E. SATER,
*Dist. Judge.*

Dated this 25" day of June, 1913.

54 And afterwards, towit: on the 25th day of July A. D. 1913, came the Plaintiff, by its Attorneys, and filed in the Clerk's Office of said Court its certain Assignment of Errors on Appeal in this cause, which said Assignment of Errors on Appeal is clothed in the words and figures following, towit:

*Assignment of Errors on Appeal.*

In the District Court of the United States, Southern District of Ohio, Eastern Division. In Equity.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

DAVID S. CREAMER, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Assignment of Errors on Appeal.

Plaintiff prays an appeal from the order and decree of this Court denying the plaintiff, after notice and hearing, an interlocutory injunction in said cause, to the Supreme Court of the United States, and assigns for error:

First. The Court erred in refusing the plaintiff an interlocutory injunction against defendants, restraining the defendant Creamer, Treasurer, from certifying plaintiff as delinquent for the current year under the Ohio statutes providing for the so-called excise tax (Act of May 31st, 1911, 102 Ohio Laws, 224,) and the defendant Fullington, Auditor, from receiving such certification and from adding any penalty to said tax or from preparing any duplicate of report thereof, and the defendants, Dittey, Munn and Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio,
55 from certifying to the Secretary of State that plaintiff had failed to pay said tax or penalty, and restraining them and the defendant Hogan, Attorney General, from taking any steps toward the collection or enforcement of said tax against plaintiff or the cancellation of its articles of incorporation.

Second. The Court erred in holding that the facts averred in the bill, (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the so-called excise tax imposed by the statutes of Ohio, (Act of May 31st, 1911, 102 Ohio Laws, 224,) upon the privilege of carrying on plaintiff's intrastate business for the current year, was wholly in excess of the value of that privilege, in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and of the preamble and Sections 2 and 19 of the Bill of Rights of the Ohio Constitution, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Third. The Court erred in holding that the facts averred in the bill, (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the classifications and sub-classifications in the Ohio statutes providing

for the so-called excise tax, (Act of May 31st, 1911, 102 Ohio Laws, 224,) were arbitrary, unreasonable, unduly and unjustly discriminatory against the plaintiff, and not a legitimate exercise of legislative power or discretion, thereby violating the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and Sections 2 and 19 of the Bill of Rights of the Ohio Constitution, did not call for or war-
56 rant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Fourth. The Court erred in holding that the facts averred in the bill, (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the Ohio statutes providing for the so-called excise tax, (Act of May 31st, 1911, 102 Ohio Laws, 224,) involved a discrimination against and imposed a burden upon interstate commerce, in violation of the commerce clause of the Constitution of the United States, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Fifth. The Court erred in holding that the facts averred in the bill, (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the Ohio statutes imposing the so-called excise tax, (Act of May 31st, 1911, 102 Ohio Laws, 224,) are a regulation of and a burden upon foreign commerce, in violation of the commerce clause of the Constitution of the United States, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Sixth. The Court erred in holding that the facts averred in the bill, (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the so-called excise tax imposed by the Ohio statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224,) is in reality a double tax upon plaintiff's property, lacking uniformity and equality, in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and Section 2, Article 12, of the Constitution of Ohio, did not call for or warrant the granting of a temporary injunction against the de-
57 fendants, as prayed for in the bill.

Seventh. The Court erred in holding that the facts averred in the bill, (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the fines, penalties and forefeitures provided for in the Ohio statutes relating to the so-called excise tax, (Act of May 31st, 1911, 102 Ohio Laws, 224,) and the provisions therein seeking to prevent a judicial review of the validity thereof, in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and Section 16 of the Bill of Rights of the Ohio Constitution, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Eighth. The Court erred in holding that the guaranty against

the imposition of a privilege tax greater in amount than the reasonable value of the privilege taxed, involved in the preamble and Sections 2 and 19 of the Bill of Rights of the Ohio Constitution, as interpreted and construed by the Ohio Supreme Court, particularly in the case of Southern Gum Company v. Laylin, Secretary of State, 66 Ohio State, 578, is applicable and operative only where the privilege tax is generally confiscatory and oppressive, and may not be invoked in individual cases wherein the tax exceeds the reasonable value of the privilege originally conferred or its continued annual value thereafter, and in consequently refusing relief by a temporary injunction from the current so-called excise tax imposed by the Ohio statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224,) on the privilege of carrying on its intrastate business, because it had not been shown that the tax in other instances, and generally, exceeded the reasonable value of the privilege taxed.

58 Ninth. The Court erred in holding the so-called excise tax imposed by the Ohio statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224,) to be an excise tax on the doing of corporate intrastate business.

Tenth. The Court erred in holding that the so-called excise tax imposed by the Ohio Statutes, (Act of May 31st, 1911, 1902 Ohio Laws, 224,) might be regarded as an exercise of the police power of the State, similar in its nature to that involved in the taxation of the business of trafficking in intoxicating liquors; and thereby saved from Constitutional infirmity.

Eleventh. The Court erred in holding that the so-called excise tax imposed by the Ohio statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224,) might be regarded as a legislative act to compensate the State and indemnify the tax payer for the increased burden resulting from the special inconvenience and expenses sustained and supervisory power exercised by the Government over corporate public utilities and for the benefit of those who own and operate such; and thereby saved from Constitutional infirmity.

Twelfth. The Court erred in holding that relief could not be afforded the plaintiff under the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States, or the preamble and Sections 2 and 19 of the Bill of Rights of the Ohio Constitution, from the current so-called excise tax imposed by the Ohio statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224,) on the ground that in plaintiff's case such tax wholly exceeded the value of the privilege taxed, without at the same time declaring the said tax invalid in its entirety and throughout the field of its application, or, at least, as to all utilities classed with the plaintiff.

F. A. DURBAN &
ROB'T J. KING,
*Attorneys for Plaintiff.*

And afterwards, towit: on the 25th day of June, A. D. 1913, there was filed in the Clerk's Office of said Court, a certain Bond in this

cause, which said Bond is clothed in the words and figures following, towit:

59 *Bond.*

Know all men by these presents, That we, The Marietta, Columbus & Cleveland Railroad Company, as principal, and The Title Guarantee and Surety Co., as sureties, are held and firmly bound unto Robert M. Dittey, Frank E. Muns and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, David S. Creamer Treasurer of the State of Ohio, Edward M. Fullington, Auditor of the State of Ohio, and Timothy S. Hogan, Attorney General of the State of Ohio, in the full and just sum of Five Hundred Dollars to be paid to the said Robert M. Dittey, Frank E. Munn and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, David S. Creamer, Treasurer of the State of Ohio, Edward M. Fullington, Auditor of the State of Ohio, and Timothy S. Hogan, Attorney General of the State of Ohio, their certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ouselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals asd dated this 25th day of June, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a term of the United States District Court for the Southern District of Ohio, Eastern Division, in a suit depending in said Court, between the Marietta, Columbus & Cleveland Railroad Company and Robert M. Dittey, Frank E. Munn and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, et al., a decree was rendered against the said The Marietta, Columbus and the said The Marietta Columbus & Cleveland Railroad Company and Cleveland Railroad Company having obtained an appeal and filed a copy thereof in the Clerk's

60 Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Robert M. Dittey, Frank E. Munn and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, David S. Creamer, Treasurer of the State of Ohio, Edward M. Fullington, Auditor of the State of Ohio, and Timothy S. Hogan, Attorney General of the State of Ohio, citing and admonishing them to be and appear at a session of the United States Supreme Court, to be holden at the City of Washington.

Now, the condition of the above obligation is such, That if the said The Marietta, Columbus & Cleveland Railroad Company, shall prosecute its appeal to effect, and answer all damages and costs if it fail to make plea good, then the above obligation to be void; else to remain in full force and virtue.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY,
By ROB'T J. KING, *Its Att'y.*
THE TITLE GUARANTY & SURETY CO.,
By C. H. BANCROFT, *Att'y in Fact.*

Sealed and delivered in presence of

____ ____

____ ____

Approved by
(SEAL) J. E. SATER,
*U. S. District Judge, S. D. O.*

And afterwards, towit: on the 30th day of June, A. D. 1913, came the Plaintiff, by its Attorneys, and filed in the Clerk's Office of said Court its certain Precipe for Transcript in this cause, which said Precipe for Trasscript is clothed in the words and figures following, towit:

61 *Precipe for Transcript.*

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

The MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
DAVID S. CREAMER, Treasurer of State of the State of Ohio, et al., Defendants.

Precipe.

To the Clerk:

You are requested to take a transcript of the record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript the entire record.

Respectfully,

F. A. DURBAN &
R. J. KING,
*Attorneys for Plaintiff.*

Service of a copy of the foregoing precipe is hereby acknowledged this twenty-fifth day of June, 1913.

TIMOTHY S. HOGAN,
*Attorney General.*
FRANK DAVIS, JR. &
CLARENCE D. LAYLIN,
*Attorneys for Defendants.*

62 THE UNITED STATES OF AMERICA,
*Southern District of Ohio,*
*Eastern Division, ss:*

I, E. E. Dilley, Clerk of the District Court of the United States, within and for the District and Division aforesaid, do hereby certify that the foregoing is a true and correct transcript of the record, as

the same appears on file and of record in the Clerk's Office of said Court, in the therein entitled cause.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Columbus, Ohio, this 30th day of June, 1913.

[Seal United States District Court, Southern Dist. Ohio.]

B. E. DILLEY, *Clerk*,
By C. P. WHITE, JR., *Deputy*.

[Endorsed:] No. 1600. United States District Court, Southern District of Ohio, Eastern Division. The Marietta, Columbus and Cleveland Railroad Company vs. David S. Creamer, Treasurer of State of the State of Ohio, et al. Certified copy of Transcript of Record.

63 *Citation*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to David S. Creamer, Treasurer of the State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States at the City of Washington, within thirty days from the date of this writ, pursuant to an appeal duly allowed by the District Court for the Southern District of Ohio, Eastern Division, and filed in the Clerk's office of said Court on the 25th day of June A. D. 1913, in a case wherein The Marietta, Columbus and Cleveland Railroad Company, a corporation, is appellant, and you are the appellees, to show cause, if any, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why
64 speedy justice should not be done to the parties in that behalf.

Witness the Honorable John E. Sater, District Judge of said District Court, this 25th day of June, A. D. 1913.

J. E. SATER,
*District Judge of the United States District Court for the Southern District of Ohio, Eastern Division.*

Service of a copy of this citation is hereby admitted, this 25th day of June, A. D. 1913.

TIMOTHY S. HOGAN,
*Attorney General, Solicitor for the said Appellees.*
CLARENCE D. TAYLOR,
FRANK DAVIS, JR.,
*Of Counsel.*

65 [Endorsed:] No. 1600. Citation United States of America, ss. The President of the United States to David S. Creamer, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio. Filed Jun- 25, 1913. B. E. Lilley, clerk.

Endorsed on cover: File No. 23,794. S. Ohio D. C. U. S. Term No. 643. The Marietta, Columbus and Cleveland Railroad Company, appellant, vs. David S. Creamer, Treasurer of the State of Ohio, Edward M. Fullington, Auditor of the State of Ohio, et al. Filed July 14th, 1913. File No. 23,794.

3

# Supreme Court of the United States

OCTOBER TERM, 1913.

No. 642.

Supreme Court, U. S.
FILED.
OCT 17 1913
JAMES H. McKENNEY,
Clerk.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY,

APPELLANT,

vs.

ROBERT M. DETTEY, ET AL., AS THE TAX COMMISSION OF OHIO, ET AL.

APPELLEES.

Appeal from the United States District Court for the Southern District of Ohio, Eastern Division.

## MOTION TO ADVANCE: CONSENT AND STATEMENT.

TIMOTHY S. HOGAN,
Attorney General of Ohio,
CLARENCE D. LAYLIN,
FRANK DAVIS, JR.,
Counsel for Appellees.

F. B. FOOTHAKER, Law Printer, 73-83 N. Third St., Columbus, O.

# Supreme Court of the United States

**OCTOBER TERM, 1913,**

**No. 642.**

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THE OHIO RIVER AND WESTERN RAILWAY COMPANY,

APPELLANT,

vs.

ROBERT M. DITTEY, ET AL., AS THE TAX COMMISSION OF OHIO, ET AL.

APPELLEES.

---

## MOTION TO ADVANCE.

Appellees move that this case be advanced, for the reason that it involves and affects a matter of general public interest, and is a case involving the collection of the revenue of the State of Ohio.

TIMOTHY S. HOGAN,
Attorney General of Ohio.
CLARENCE D. LAYLIN,
FRANK DAVIS, JR.,
Counsel for Appellees.

## WAIVER OF NOTICE AND CONSENT.

The appellant, by its counsel, hereby waives notice of above motion and agrees and consents that the same may be presented to the court on Monday, October 20, 1913, and consents to the granting of the same.

F. A. DURBAN,
R. J. KING,
Attorneys for Appellant.

## STATEMENT.

This case involves the constitutionality of an Act of the General Assembly of the State of Ohio, imposing excise taxes, at different rates, on railroads, interurban railroads, electric light companies, natural gas companies and various other public utilities. Appellant will contend in this court that the act violates the constitutional limitations, in that its rates of taxation are, as to appellant and others in a similar situation, confiscatory; in that the classification of the subjects of taxation, made by the act, is unreasonable and results in a denial to the appellant, and others in a similar situation, of the equal protection of the laws of the state; and that the practical result of the operation of the acts is to impose burdens upon foreign commerce and commerce among the several states.

The District Court sustained the act against all of these objections and refused to issue a temporary injunction; but the officers of the state are embarrassed in their administration of the act by the apprehension of the issuance of an injunction in this court, and in other similar cases, and are taking no steps to administer the same as to objecting public utilities, pending the determination of this case.

The entire expenses of the government of the State of Ohio, excepting the support of its educational institutions, public schools, and a few minor departments which are self-supporting, are paid from what is known as the "General Revenue Fund" of the state. The total recepits of the said "General Revenue Fund" for the fiscal year ending November 15, 1912, amounted to $10,253,171. Of this

amount the sum of $2,951,188.54 was derived from excise taxes on railroads and other public utilities.

The questions raised in the case are therefore of vital interest to the state itself, as well as to the subjects of the tax; and it is suggested that the circumstances are so special and peculiar as to justify the advancement of the case.

Respectfully submitted,

TIMOTHY S. HOGAN,
Attorney General of Ohio.
CLARENCE D. LAYLIN,
FRANK DAVIS, JR.,
Counsel for Appellees.

# Supreme Court of the United States

**OCTOBER TERM, 1913,**

**No. 643.**

---

THE MARIETTA, COLUMBUS & CLEVELAND RAILWAY COMPANY,

APPELLANT,

vs.

DAVID S. CREAMER, TREASURER OF THE STATE OF OHIO, ET AL.,

APPELLEES.

---

## MOTION TO ADVANCE.

Appellees move that this case be advanced, for the reason that it involves and affects a matter of general public interest, and is a case involving the collection of the revenue of the State of Ohio.

TIMOTHY S. HOGAN,
Attorney General of Ohio.
CLARENCE D. LAYLIN,
FRANK DAVIS, JR.,
Counsel for Appellees.

## WAIVER OF NOTICE AND CONSENT.

The appellant, by its counsel, hereby waives notice of above motion and agrees and consents that the same may be presented to the court on Monday, October 20, 1913, and consents to the granting of the same.

F. A. DURBAN,
R. J. KING,
Attorneys for Appellant.

## STATEMENT.

This case involves the constitutionality of an Act of the General Assembly of the State of Ohio, imposing excise taxes, at different rates, on railroads, interurban railroads, electric light companies, natural gas companies and various other public utilities. Appellant will contend in this court that the act violates the constitutional limitations, in that its rates of taxation are, as to appellant and others in a similar situation, confiscatory; in that the classification of the subjects of taxation, made by the act, is unreasonable and results in a denial to the appellant, and others in a similar situation, of the equal protection of the laws of the state; and that the practical result of the operation of the acts is to impose burdens upon foreign commerce and commerce among the several states.

The District Court sustained the act against all of these objections and refused to issue a temporary injunction; but the officers of the state are embarrassed in their administration of the act by the apprehension of the issuance of an injunction in this court, and in other similar cases, and are taking no steps to administer the same as to objecting public utilities, pending the determination of this case.

The entire expenses of the government of the State of Ohio, excepting the support of its educational institutions, public schools, and a few minor departments which are self-supporting, are paid from what is known as the "General Revenue Fund" of the state. The total receipts of the said "General Revenue Fund" for the fiscal year ending November 15, 1912, amounted to $10,253,171. Of this

amount the sum of $2,951,188.54 was derived from excise taxes on railroads and other public utilities.

The questions raised in the case are therefore of vital interest to the state itself, as well as to the subjects of the tax; and it is suggested that the circumstances are so special and peculiar as to justify the advancement of the case.

Respectfully submitted,

TIMOTHY S. HOGAN,
Attorney General of Ohio.
CLARENCE D. LAYLIN,
FRANK DAVIS, JR.,
Counsel for Appellees.

# INDEX.


STATEMENT OF CASE 3

Nature of Case: Suit for injunction to restrain certification against appellants of Ohio excise tax imposed on privilege of carrying on their intrastate business, amounting to four per cent. on gross earnings after deducting those from interstate business and business done for the Federal Government ..... 3

Temporary injunction refused by the District Court ..... ..... 4

Ohio River and Western Ry. Co. v. Dittey et al., etc., 203 Federal, 537..... 4

Appeal direct to this court under Section 266 of the Code ..... 4

Provisions of Ohio statutes dealing with tax in question ..... ..... 5-6

Jurisdiction: ....

The federal jurisdiction rests upon the presence of federal questions..... 6

The equity jurisdiction rests upon prevention of cloud upon real estate title, inadequacy of legal remedies, threatened irreparable damage and prevention of multiplicity of suits ..... 6-9

Cooley on Taxation, page 536..... 6
Dows v. Chicago, 78 U. S. (11 Wallace), 108-112 ..... 6
Shelton v. Platt, 139 U. S., 591..... 6
Young ex parte, 209 U. S., 123..... 7
Assignment of Errors on Appeal..... 9

## ARGUMENT.

A. UNDER THE CONSTITUTION OF OHIO, AS CONSTRUED BY THE OHIO SUPREME COURT IN THE CASE OF SOUTHERN GUM CO. V. LAYLIN, 66 OHIO STATE, 578, THE LEGISLATURE IS WITHOUT POWER TO IMPOSE A PRIVILEGE TAX WHICH IS IN EXCESS OF THE VALUE OF THE PRIVILEGE TAXED, AND INASMUCH AS THE ADMITTED FACTS SHOW THE PRESENT TAX UPON APPELLANTS TO WHOLLY EXCEED SUCH VALUE, ITS EXACTION AS TO THEM VIOLATES THE STATE CONSTITUTION, AND AMOUNTS TO CONFISCATION AND A TAKING OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW ..... 14-52
Adler v. Whitbeck, 44 Ohio State, 539....32, 44
Barnes v. Brown et al., 130 N. Y., 371.... 25
City of Allegheny v. Western Pennsylvania R. Co., 138 Pennsylvania State, 375-383.. 28
Dillon v. Anderson, 43 N. Y., 231..... 24
Erickson v. Cass County, 11 North Dakota, 494 ..... 29
Galligher v. Jones, 129 U. S., 193..... 24
Galveston, H. & S. A. R. Co. v. Texas, 210 U. S., 223-226 ..... 21

Gray's Limitation of Taxing Power and Public Indebtedness, Section 47a..... 42
Gray's Limitation of Taxing Power and Public Indebtedness, Section 1317..... 41
Hagerty v. State, 55 Ohio State, 613..... 33
Hartford v. West Middle District, 45 Conn., 462 ..... 29
Martin v. District of Columbia, 205 U. S., 135 ..... 28
Northern Pacific R. Co. v. North Dakota, 216 U. S., 579..... 27
Norwood v. Baker, 172 U. S., 269..... 28
O'Brien v. Wheelock, 184 U. S., 450..... 28
Ohio River and Western Ry. Co. v. Dittey et al., etc., 203 Federal, 537-541..... 32
Postal Telegraph Co. v. Adams, 155 U. S., 688-697 .....21, 30
Shoemaker v. U. S., 147 U. S., 282..... 28
Southern Gum Co. et al. v. Laylin, 66 Ohio State, 578 .....16, 17, 19
State v. Guilbert, 70 Ohio State, 229..... 32
State ex rel. v. Ferris, 53 Ohio State, 314.. 32
State Railroad Tax Cases, 92 U. S., 575-606 .....40, 41, 43
Sutherland on Damages, Sections 88-89.... 24
Sutherland on Damages, Section 657..... 25
Sutherland on Damages, Section 692..... 26
Walsh v. Barron, Treasurer, 61 Ohio State, 15 ..... 29
Warren v. Stoddart, 105 U. S., 224..... 24
Western Union Telegraph Co. v. Wright, 185 Federal, 250-257 ..... 30

Western Union Telegraph Co. v. Mayer, 28 Ohio State, 521 ..... 32, 35
Wilcox v. Consolidated Gas Co., 212 U. S., 19 ..... 27

1.

*The tax in question is not a tax upon corporate franchises or privileges, as such, and cannot be saved on that theory*..36, 44-45
Adler v. Whitbeck, 44 Ohio State, 539.... 44
Flint v. Stone Tracy Co., 220 U. S., 107.... 45
State ex rel. v. Taylor, 55 Ohio State, 61.... 47

2.

*The tax cannot be regarded as an exercise of the police power, for the purpose of meeting expenses incident to the regulation of railroads and other utilities*.....44-49
Adler v. Whitbeck, 44 Ohio State, 539..... 44
Tennessee v. Whitworth, 117 U. S., 129.... 49

3.

*The value limitation, as laid down in the case of Southern Gum Co. v. Laylin, supra, is for the protection of the individual and his property*.....31-52
Cooley's Constitutional Limitations, Seventh Edition, page 65 ..... 49
Missouri Rate Cases, 230 U. S., 474-508.... 50
Walsh v. Barron, Treasurer, 61 Ohio State, 15 ..... 50

B. ARBITRARY AND DISCRIMINATORY CLASSIFICATION .....52-67
Athens v. N. Y., etc., Tel. Co., 9 Pa. Dist. Rep., 253 ..... 62

Barber v. Connolly, 113 U. S., 27..... 66
Beckett v. Mayor, 118 Georgia, 58..... 56
Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S., 232..... 54
Cache County v. Jensen, 21 Utah, 207..... 61
Clark v. Titusville, 184 U. S., 329..... 54
Findlay v. Frye, 51 O. S., 390..... 59
Gulf, etc., Ry. Co. v. Ellis, 165 U. S., 150-65 58
Home Ins. Co. v. New York, 134 U. S., 594.. 54
Haeger v. Burr, 36 O. S., 164..... 59
Juniata Limestone Co. v. Gagley, 187 Pa. St., 193 ..... 64
Kentucky Railroad Tax Cases, 115 U. S., 321 ..... 54
Magoun v. Illinois Trust & Savings Bank, 170 U. S., 283 ..... 55
Minneapolis Ry. Co. v. Beckwith, 129 U. S., 26 ..... 66
Peoria v. Gugenheim, 61 Ill. App., 374..... 62
P. R. Co. v. Connelly, 10 O. S., 159..... 59
P. R. Co. v. Poland, 10 Nisi Prius, N. S., 617 ..... ..... 60
State v. Heinnan, 65 N. H., 103..... 65
State v. Moore, 113 N. C., 697..... 61
State v. Whitcorn, 122 Wisconsin, 110.... 62
Toppington v. Oviatt, 24 O. S., 232..... 59
Western Union Tel. Co. v. Wright, 185 Federal, 250 ..... 65
Wyatt v. Ashbrook, 154 Missouri, 375..... 63
Wyman on Public Service Corporations, Secs. 39-53-97-100-106 ..... 53

C. THE FOUR PER CENT. TAX, IN THE CASE OF RAILROADS, WAS IMPOSED BECAUSE OF THEIR BEING EXTENSIVELY ENGAGED IN INTERSTATE COMMERCE, AND WAS INTENDED TO BE AND IS A BURDEN UPON INTERSTATE COMMERCE, IN VIOLATION OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION ..... 67-75

Brimmer v. Rebman, 138 U. S., 78..... 73

Galveston, etc., Ry. Co. v. Texas, 210 U. S., 217 ..... 68, 69

McCulloch v. Maryland, 4 Wheat., 316.... 74

Mugler v. Kansas, 123 U. S., 623..... 74

U. S. Express Co. v. Minnesota, 223 U. S., 335-341 ..... 73

D. SHOULD IT BE CLAIMED THAT THE PRIVILEGE OF CARRYING ON APPELLANTS' BUSINESS HAS A VALUE IF CONSIDERED AS PROPERTY, SUFFICIENT TO MEET THE REQUIREMENTS OF THE VALUE LIMITATION IN THE LAYLIN CASE, THE RESULT WOULD BE A DOUBLE TAX ON PROPERTY..... 75

Adams Express Co. v. Ohio State Anditor, 165 U. S., 194..... 75

On rehearing. 166 U. S., 185..... 75

E. THE TAX IS BASED UPON ALL GROSS EARNINGS, EXCEPTING ONLY SUCH AS ARE DERIVED WHOLLY FROM INTERSTATE BUSINESS AND BUSINESS FOR THE FEDERAL GOVERNMENT. THE FAILURE TO EXCLUDE ALSO EARNINGS FROM FOREIGN COMMERCE, IN WHICH APPELLANTS ARE ENGAGED, RENDERS ACT INVALID UNDER COMMERCE CLAUSE ..... 76-81

Eidman v. Martinez, 184 U. S., 578..... 81
Hepburn & Dundas v. Ellzey, 2 Cranch., 445 ..... 80
Lord v. Steamship Co., 102 U. S., 541.... 77
Meyer, Auditor, v. Wells, Fargo & Co., 223 U. S., 298-302 ..... 79
Veazie v. Moor, 14 How., 568-573..... 76
F. THE ACT IS UNCONSTITUTIONAL BECAUSE OF ITS EFFORT TO PREVENT JUDICIAL INQUIRY AND FORCE OBEDIENCE TO ITS TERMS AND TO ADMINISTRATIVE ACTS THEREUNDER, IRRESPECTIVE OF THEIR VALIDITY. IT THEREBY DENIES DUE PROCESS AND EQUAL PROTECTION .....81-90
Davidson v. New Orleans, 96 U. S., 97.... 89
Goldberg, Bowen & Co. v. Stablemen's Union, 86 Pacific, 806 ..... 88
Jones v. Davis, 35 Ohio State, 474..... 89
Pierce v. Stablemen's Union, 103 Pacific, 324 ..... 88
Southern Gum Co. v. Laylin, 66 Ohio State, 578 ..... 87
State ex rel. v. Jones, Auditor, 51 Ohio State, 492-516 ..... 88
Young ex parte, 209 U. S., 123..... 86

IN THE

# Supreme Court of the United States

## OCTOBER TERM, 1913,

---

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, A CORPORATION,

APPELLANT,

vs.

ROBERT M. DITTEY, FRANK E. MUNN AND CHRISTIAN PABST, AS THE TAX COMMISSION OF OHIO, AND THE TAX COMMISSION OF OHIO,

APPELLEES,

[No. 642.]

And

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, A CORPORATION,

APPELLANT,

vs.

DAVID S. CREAMER, TREASURER OF STATE OF THE STATE OF OHIO; EDWARD M. FULLINGTON, AUDITOR OF STATE OF THE STATE OF OHIO; TIMOTHY S. HOGAN ATTORNEY GENERAL OF THE STATE OF OHIO; ROBERT M. DITTEY, FRANK E. MUNN AND CHRISTIAN PABST, AS THE TAX COMMISSION OF OHIO, AND THE TAX COMMISSION OF OHIO,

APPELLEES.

[No. 643.]

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## BRIEF FOR APPELLANTS.

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### STATEMENT OF CASE.

These suits were brought in the United States District Court for the Southern District of Ohio (East-

ern Division) by the appellants, which are Ohio railroad corporations, to enjoin the certification and collection by the appellees of a tax which the State of Ohio was seeking to enforce upon the privilege of carrying on business in that state. This tax appellants claimed to be in violation of the due process and equal protection clauses of the Fourteenth Amendment and of the Commerce Clause of the Federal Constitution, and also of the Preamble and sections two and nineteen of the Ohio Constitution.

A temporary restraining order was allowed by the District Court, and later the appellants' motions for temporary injunctions came on for hearing before three judges, of whom one was a circuit judge, pursuant to Section 266 of the Judicial Code, which went into effect shortly after the bills were filed. The two cases were argued and considered together, upon the facts averred in the bills, which were, for the purposes of such motions, conceded to be true by appellees, and, after consideration, the temporary injunction was refused.

*Ohio River and Western Ry. Co. v. Dittey et al.*, 203 Federal, 537.

Thereupon appellants came by appeal direct to this court, under favor of Section 266 of the Code.

By agreement, the two cases are briefed together, as they present practically the same facts and exactly the same questions of law.

The tax in question, the validity of which we attack generally, and also specially in its application to appellants, was enacted in its present form May 31, 1911. (102 Ohio Laws, 224.)

It created a tax commission, with defined powers, and prescribed various taxes, some upon property and others

upon franchises and privileges, with sundry provisions, penal and otherwise, for the collection thereof. Some of these taxes were new in Ohio law, others were carried over from previously existing statutes.

The tax here in question is limited in its operation to certain lines of quasi-public business, specifically named in the act and therein referred to as "public utilities," including railroads.

As applied to railroads, the act requires the filing with the Tax Commission, by each railroad doing business in the state, of a statement, on or before September 1, setting forth, among other things, its "entire gross earnings, including all sums earned or charged, whether actually received or not, for the year ending on the thirtieth day of June next preceding, from whatever source derived, for business done within this state, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government." (Section 82 of Act; Section 5471, General Code of Ohio.)

It is further provided that on the first Monday of October the Commission "shall ascertain and determine the gross earnings as herein provided of each railroad company whose line is wholly or partially within this state for the year ending on the thirtieth day of June next preceding, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government. The amount so ascertained by the Commission shall be the gross earnings of such railroad company for such year." (Section 5477, General Code.)

The Act further provides that on the first Monday of November the Commission shall certify to the Auditor of State the amount of the "gross earnings thus determined,"

(G. C., 5482)—and that—"In the month of November, the Auditor of State shall charge for collection from each railroad company, a sum in the nature of an excise tax, for the privilege of carrying on its intrastate business, to be computed on the amount so fixed and reported to him by the Commission as the gross earnings of such company on its interstate business for the year" * * * "by taking four per cent. of all such gross earnings." The tax is imposed equally and alike on corporations, partnerships, and individuals. (G. C., Section 5415.)

The general origin and nature of the tax having been thus briefly referred to, we believe that our brief may be shortened and, in a measure, simplified by introducing the other facts subsequently in connection with our discussion of the several assignments of error, as to which respectively such facts may be pertinent.

**Jurisdiction.**

The Federal jurisdiction rested upon the Federal questions presented in the record, and not upon diversity of citizenship. The bills were filed prior to January 1, 1912. The amount in controversy in each case exceeds two thousand dollars, exclusive of interest and costs. Neither the Federal nor the equity jurisdiction is challenged by appellees.

The Act specifically makes the tax a lien upon the real estate of appellants, from the cloud of which they sought to free it by the bringing of their suits. (Section 5506, G. C.)

This has been frequently held to be sufficient to warrant a resort to equity.

*Shelton v. Platt*, 139 U. S., 591.
*Cooley on Taxation*, page 536.
*Dows v. Chicago*, 78 U. S. (11 Wall.), 108-12.

In addition to this feature of the case, there are also other elements which make it plain that there is no adequate remedy at law, and that the threatened mischief is irreparable.

One of the appellants, The Marietta, Columbus and Cleveland Railroad Company (which, for convenience, we shall hereinafter call the Marietta Company) is absolutely without means to pay the tax, short of the dismemberment of its physical property and the consequent destruction of its public business, inasmuch as it is not earning enough to pay its operating expenses. The other appellant, The Ohio River and Western Railway Company (which, for convenience, we shall call the Ohio River Company) is not quite so desperately situated, but the averments in its bill show, we think, its financial condition to be such as to warrant the conclusion that an indefinite deprivation of the amount involved in the tax while an action at law were pending for its recovery would be such a hardship as to amount to irreparable injury.

Again, the penalties and coercive features of the Act are such as to warrant injunctive relief from the irreparable injury which their infliction would cause. Among such features is a provision, in effect, that non-payment of the tax for ninety days shall result in the cancellation of the delinquent's articles of incorporation, with heavy penalties for continued corporate activity of any kind. It is apparent that such "capital punishment" would effectually paralyze resistance to any attempts at collection of the tax, long before its validity could be determined. Indeed, as we shall subsequently point out at length, the penal provisions of the Act are so excessive as to be invalid and hence to warrant injunctive protection against their imposition.

*Ex parte Young*, 209 U. S., 123.

It is at least extremely doubtful whether, in any event, an action at law could be maintained to recover the tax after payment.

Section 12075, G. C., provides:

> "Common Pleas and Superior Courts may enjoin the illegal levy or collection of taxes and assessments, and entertain actions to recover them back when collected, without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected."

Such right of recovery, however, is rendered inapplicable in case of the present tax (which is not collected on the county duplicates) by the provisions of Sections 12077, G. C., to the effect that—

> "Actions to recover back taxes and assessments must be brought against the officer who made the collection, or if he be dead, against his personal representative. When they are not collected on the county duplicate, the corporation which made the levy must be joined in the action."

Inasmuch as in the present case the State itself was the corporation which made the levy, its immunity from suit would preclude a recovery back of the tax after its payment.

Furthermore, even if this were not true, we think it is a serious question whether the special provisions of Section 33 of the Act (1465-31, G. C.) do not supercede pro tanto the general terms of Section 12075, supra, and limit the protesting utility to a refusal to pay and a defense on the ground of illegality. Maintenance of such a defense would soon become impossible, as already shown, by virtue of the cancellation of its articles and paralysis of its power of corporate action.

Section 33 just referred to, and which we shall further consider, infra, attempts to forbid injunctive interference with the collection of the tax, and provides that "nothing herein shall affect any right or defense in any action to collect any tax or penalty."

Finally, such various and apparently concurrent methods are provided by the Act for enforcing the tax, through different agencies, that a multiplicity of actions is avoided by the simple suit in equity.

**Assignment of Errors on Appeal.**

*First:* The court erred in refusing the plaintiff an interlocutory injunction against defendants, restraining the defendant, Creamer, Treasurer, from certifying plaintiff as delinquent for the current year under the Ohio statutes providing for the so-called excise tax (Act of May 31, 1911, 102 Ohio Laws, 224), and the defendant Fullington, Auditor, from receiving such certification and from adding any penalty to said tax or from preparing any duplicate of report thereof, and the defendants, Dittey, Munn and Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, from certifying to the Secretary of State that plaintiff had failed to pay said tax or penalty, and restraining them and the defendant Hogan, Attorney General, from taking any steps toward the collection or enforcement of said tax against plaintiff or the cancellation of its articles of incorporation.

*Second:* The court erred in holding that the facts averred in the bill (which were, for the purposes of the application for a temporary injunction, admitted by defendants), to the effect that the so-called excise tax imposed by the statutes of Ohio (Act of May 31, 1911, 102

Ohio Laws, 224), upon the privilege of carrying on plaintiff's intrastate business for the current year, was wholly in excess of the value of that privilege, in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and of the preamble and Sections 2 and 19 of the Bill of Rights of the Ohio Constitution, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

*Third:* The court erred in holding that the facts averred in the bill (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the classifications and subclassifications in the Ohio statutes providing for the so-called excise tax (Act of May 31, 1911, 102 Ohio Laws, 224), were arbitrary, unreasonable, unduly and unjustly discriminatory against the plaintiff, and not a legitimate exercise of legislative power or discretion, thereby violating the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and Sections 2 and 19 of the Bill of Rights of the Ohio Constitution, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

*Fourth:* The court erred in holding that the facts averred in the bill (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the Ohio statutes providing for the so-called excise tax (Act of May 31, 1911, 102 Ohio Laws, 224), involved a discrimination against and imposed a burden upon interstate commerce, in violation of the commerce clause of the Constitution of the United

States, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

*Fifth:* The court erred in holding that the facts averred in the bill (which were, for the purposes of the application for a temporary injunction, admitted by defendants), to the effect that the Ohio statutes imposing the so-called excise tax (Act of May 31, 1911, 102 Ohio Laws, 224), are a regulation of and a burden upon foreign commerce, in violation of the commerce clause of the Constitution of the United States, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

*Sixth:* The court erred in holding that the facts averred in the bill (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the so-called excise tax imposed by the Ohio statutes (Act of May 31, 1911, 102 Ohio Laws, 224), is in reality a double tax upon plaintiff's property, lacking uniformity and equality, in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and Section 2, Article 12, of the Constitution of Ohio, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

*Seventh:* The court erred in holding that the facts averred in the bill (which were, for the purposes of the application for a temporary injunction, admitted by defendants), to the effect that the fines, penalties and forfeitures provided for in the Ohio statutes relating to the so-called excise tax (Act of May 31, 1911, 102 Ohio Laws,

224), and the provisions therein seeking to prevent a judicial review of the validity thereof, in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and Section 16 of the Bill of Rights of the Ohio Constitution, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

*Eighth:* The court erred in holding that the guaranty against the imposition of a privilege tax greater in amount than the reasonable value of the privilege taxed, involved in the preamble and Sections 2 and 19 of the Bill of Rights of the Ohio Constitution, as interpreted and construed by the Ohio Supreme Court, particularly in the case of Southern Gum Company v. Laylin, Secretary of State, 66 Ohio State, 578, is applicable and operative only where the privilege tax is generally confiscatory and oppressive, and may not be invoked in individual cases wherein the tax exceeds the reasonable value of the privilege originally conferred or its continued annual value thereafter, and in consequently refusing relief by a temporary injunction from the current so-called excise tax imposed by the Ohio statutes (Act of May 31, 1911, 102 Ohio Laws, 224), on the privilege of carrying on its intrastate business, because it had not been shown that the tax in other instances, and generally, exceeded the reasonable value of the privilege taxed.

*Ninth:* The court erred in holding the so-called excise tax imposed by the Ohio statutes (Act of May 31, 1911, 102 Ohio Laws, 224), to be an excise tax on the doing of corporate intrastate business.

*Tenth:* The court erred in holding that the so-called excise tax imposed by the Ohio statutes (Act of May 31,

1911, 102 Ohio Laws, 224), might be regarded as an exercise of the police power of the State, similar in its nature to that involved in the taxation of the business of trafficking in intoxicating liquors; and thereby saved from Constitutional infirmity.

*Eleventh:* The court erred in holding that the so-called excise tax imposed by the Ohio statutes (Act of May 31, 1911, 102 Ohio Laws, 224), might be regarded as a legislative act to compensate the State and indemnify the taxpayer for the increased burden resulting from the special inconvenience and expenses sustained and supervisory power exercised by the Government over corporate public utilities and for the benefit of those who own and operate such; and thereby saved from Constitutional infirmity.

*Twelfth:* The court erred in holding that relief could not be afforded the plaintiff under the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States, or the preamble and Sections 2 and 19 of the Bill of Rights of the Ohio Constitution, from the current so-called excise tax imposed by the Ohio statutes (Act of May 31, 1911, 102 Ohio Laws, 224), on the ground that in plaintiff's case such tax wholly exceeded the value of the privilege taxed, without at the same time declaring the said tax invalid in its entirety and throughout the field of its application, or, at least, as to all utilities classed with the plaintiff.

## ARGUMENT.

A. UNDER THE CONSTITUTION OF OHIO, AS CONSTRUED BY THE OHIO SUPREME COURT, THE LEGISLATURE IS WITHOUT POWER TO IMPOSE A PRIVILEGE TAX WHICH IS IN EXCESS OF THE VALUE OF THE PRIVILEGE TAXED, AND INASMUCH AS THE ADMITTED FACTS SHOW THE PRESENT TAX UPON APPELLANTS TO WHOLLY EXCEED SUCH VALUE, ITS EXACTION AS TO THEM VIOLATES THE STATE CONSTITUTION, AND AMOUNTS TO CONFISCATION AND THE TAKING OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

This involves the Second, Eighth, Ninth, Tenth, Eleventh and Twelfth Assignments of Error.

From the bill of the Marietta Company it appears that the tax charged against it for the year 1911 amounts to $2301.24.

That:

> "The capital of the plaintiff has been and is, practically without exception, all invested in the said railroad owned and operated by it as aforesaid, which said investment was and is a reasonable and proper one."

That:

> "Due care and prudence have been exercised in the construction, maintenance, operation and equipment of said railroad property and in the conduct of its business, nor have the same been characterized by waste or extravagance. On the contrary, the greatest economy has been and is being practiced in a bona fide effort to make said railroad yield a fair return upon the investment therein, and all practical means

have been exhausted to increase or render more remunerative plaintiff's freight and passenger traffic, or either of them."

That:

"Notwithstanding the efforts of the plaintiff, it has never been able to earn and is not now able to earn, from its interstate or its intrastate business or both combined, after paying necessary and proper expenses, including taxes other than said excise tax, a return on the investment in its said railroad, or on the value thereof, equal to or as much as the current rate of return on legitimate and high grade investments at all times readily available on the market, nor have its intrastate earnings, after deducting expenses properly attributable to intrastate operations (including taxes other than said excise tax) been sufficient to yield a return on that portion of said investment, or on that portion of said value, properly attributable to intrastate operations, equal to or as much as the current rate of return on legitimate, high grade investments at all times readily available on the market as aforesaid. On the contrary, the plaintiff's gross earnings have not been and are not sufficient to pay its actual operating expenses, nor are its gross intrastate earnings sufficient to pay that portion of its operating expenses properly attributable to intrastate operations, including taxes other than said excise tax, and the plaintiff is actually operating its railroad at great loss; and said condition will continue to exist and will exist during the year which said excise tax is intended to cover."

That:

"Said excise tax and every part thereof exceeds the reasonable annual value of the privilege of carrying on plaintiff's intrastate business," etc., etc.

The bill of the Ohio River Company contains the same averments, except as to the inability to pay actual operating expenses. Its tax amounts to $6653.60.

**The Value Limitation.**

The leading and controlling case in Ohio is *Southern Gum Co. et al. v. Laylin*, 66 Ohio State, 578. The general validity of the so-called Willis tax, which was a corporate tax upon the franchise to be a corporation, was before the court. While upholding the law under which that tax was imposed, the court took occasion to point out certain definite limitations imposed by the guaranties of the Ohio constitution upon the legislature in the taxation of franchises and privileges generally.

These limitations are thus clearly stated in the syllabus (second and third branches), which, under the rules of the Ohio Supreme Court, contains the actual decision of the court:

> "While there is no express limitation upon the power of the general assembly to tax privileges and franchises, such power is impliedly limited by those provisions of the constitution which provide that private property shall ever be held inviolate, but subservient to the public welfare, that government is instituted for the equal protection and benefit of the people, and that the constitution is established to promote our common welfare.
>
> "By reason of these limitations, a tax on privileges and franchises cannot exceed the reasonable value of the privilege or franchise originally conferred, or its continued annual value hereafter. The determination of such values rests largely in the general assembly, but finally in the courts."

Following are the guaranties in the Ohio constitution, to which the court referred:

> "We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings *and promote our common welfare*, do establish this Constitution." (Preamble.)

"All political power is inherent in the people. Government is instituted for their equal protection and benefit," etc. (From Section 2, Article I.)

"Private property shall ever be held inviolate, but subservient to the public welfare." (From Section 19, Article I.)

As above stated, the so-called Willis tax involved in the Laylin case was a tax upon corporate franchises. In its opinion, the court clearly distinguishes between property taxes and taxes upon franchises and privileges, and points out and distinguishes between the limitations imposed by the Ohio constitution upon the one and the other respectively.

Thus, at pages 593-5, the following language occurs:

"The state is a sovereignty and its powers are sovereign, except as limited and restricted by the Constitution of the United States.

"The grant of legislative power to the general assembly in section one of article two of the constitution is absolute, and is not limited in that section. The absolute and unlimited power of taxation is granted by that section to the general assembly, and the taxation may be upon franchises, privileges or property, as the general assembly may deem best; but when it comes to taxing property, there is a limitation placed upon that power by sections one, two and three of article twelve of the constitution, and by section four of article thirteen of the same instrument. By section one of article twelve, a limitation prohibits the levying of a poll tax for county or state purposes. By section two of the same article, all taxable property, real and personal, is required to be taxed by a uniform rule as its true value in money. By section three all property employed in banking is required to bear a burden of taxation, equal to that imposed on the property of individuals; and by section four of article thirteen, property of corporations is subject to taxation the same as the property of individuals.

These are very important limitations upon the power of taxation of property granted by said section one of article two of the constitution, and are intended to secure uniformity and equality in taxation on property.

"But upon the power to tax privileges and franchises there is no express limitation in the constitution, but certain limitations upon that power must be implied from other provisions of the constitution, so as to make the whole instrument harmonious and consistent throughout. The constitution was established to 'promote our common welfare.' Preamble to the constitution. Government is instituted for the equal protection and benefit of the people. Section two of the bill of rights. Private property shall ever be held inviolate, but subservient to the public welfare. Section nineteen of the bill of rights. These provisions of the constitution are implied limitations upon the power of taxation of privileges and franchises, and limit such taxation to the reasonable value of the privilege or franchise conferred originally, or to its continued value from year to year. *Ashley v. Ryan*, 49 Ohio St., 504; *State ex rel. v. Ferris*, 53 Ohio St., 314, and *Hagerty v. State*, 55 Ohio St., 613, are examples of taxing the privilege or franchise conferred; while *Telegraph Co. v. Mayer*, 28 Ohio St., 521, and *Express Co. v. State*, 55 Ohio St., 69, are examples of taxing the continued value of the existing privilege or franchise from year to year.

"These limitations prevent confiscation and oppression under the guise of taxation, and the power of such taxation cannot extend beyond what is for the common or public welfare, and the equal protection and benefit of the people; but the ascertaining and fixing of such values rests largely in the general assembly, but finally in the courts."

The court then proceeds to discuss some of the elements of value involved generally in corporate existence—being

that particular kind of privilege which the Willis tax was designed to reach, as follows:

> "A domestic corporation is given life and continued existence by the state, and this life and existence with their accompanying powers constitute the franchise, and this franchise being valuable and given by the state, the state may impose a franchise tax thereon to the amount of the value thus conferred and continued, the same as in taxation by assessment, the public first bestows a special benefit upon the property, and then takes back by way of assessment a part or all it has thus conferred. *Walsh v. Barron*, 61 Ohio St., 15. A foreign corporation can do business in this state only upon such terms and conditions as the state may impose, and therefore a franchise tax may be imposed upon a foreign corporation for the privilege of doing business in this state. It therefore follows that a franchise tax may be imposed on both domestic and foreign corporations alike."

It is not claimed that the rule thus laid down has ever been changed or modified. As an interpretation by the Ohio court of last resort of its own constitution, it is, of course, not subject to question in this court.

We may rest then safely upon the proposition that if the tax upon the privilege exercised by these plaintiffs exceeds the value thereof, it is void.

If the constitutional limitations as expounded in the Lavlin case are to be real and vital and are to afford genuine protection to the individual, they must, of course, be capable of practical application.

We are thus conducted to the question: What is the measure of the continued value to the plaintiffs of the carrying on of their intrastate business, respectively?

The averments in the bills which, for present purposes, stand admitted, disclose that notwithstanding prudent in-

vestment, wise and economic management, and the exhaustion of all practicable means to increase the revenue, the plaintiff, The Marietta, Columbus and Cleveland Railroad Company, is not able to and will not be able to earn enough on its intrastate business to pay the expenses of carrying it on; while The Ohio River and Western Railway Company, under similar circumstances, cannot earn even that minimum rate of return which the value of its property would bring if invested in high grade securities always available on the market. If the value of the naked privilege of carrying on a business is to be measured by the available fruits thereof, then is it not apparent that the State is here attempting to tax a value which does not exist, and to take that which it has never conferred? The admitted averments of the bill of The Marietta, Columbus and Cleveland Railroad Company show that the business itself is valueless, and while the bill of the Ohio River and Western Railway Company does not show an entire absence of net earning power, it does show that the privilege of carrying on the business possesses no value, and this privilege is the thing that is taxed.

There is an obvious distinction between the value of a business and the value of the privilege of engaging in that business. For the reasons just mentioned, this distinction is important only as regards the case of The Ohio River and Western Railway Company, and before giving it further consideration we wish to briefly refer to the case of The Marietta, Columbus and Cleveland Railroad Company. As to it, both the privilege of engaging in intrastate business and the business itself are without value. It is idle to claim that a business which is conducted at a loss is a valuable business, and much the less that the privilege of engaging in it possesses any value.

Common sense and authority alike support the proposition laid down by this court through Mr. Chief Justice FULLER in *Postal Telegraph Cable Company v. Adams*, 155 U. S., 688-697:

> "* * the value of property results from the use to which it is put and varies with the profitableness of that use."

See also Galveston, H. & S. A. R. Co. v. Texas, 210 U. S., 223, 226.

A business which, under prudent and economic management, will not earn enough to pay its necessary expenses, and cannot be made to do so, possesses no value. On the contrary, its operation necessarily means a loss to the proprietor. Under the averments of its bill, The Marietta, Columbus and Cleveland Railroad Company is serving the public at a loss, and to say that the opportunity of doing so constitutes a valuable privilege would seem to furnish its own refutation.

The case of The Ohio River and Western Railway Company furnishes an illustration of the distinction above referred to between the value of a business and the value of the privilege of carrying it on. The value of a business may be measured by the net return which it yields upon the investment. This is an absolute thing. The value of the privilege of carrying on that business, however, is necessarily a relative thing, and is measured by the excess, if any, which it yields upon the investment, over and above what a readily available investment of the same capital would yield. To illustrate, let us suppose that industrial bonds of ordinary security are issued, bearing two per cent. interest. Such bonds will have a certain absolute value,

notwithstanding their unattractiveness. The privilege of acquiring such bonds, however, obviously possesses no value, and if the opportunity to acquire the same should be wrongfully denied anyone, he could not successfully claim to have suffered any real damage. While in such a case the individual may have been denied an opportunity to which he was legally entitled, he has not been damaged, because equally good and, indeed, much better investments are readily available to him.

The theory upon which alone, under our Ohio Constitution as interpreted in the Laylin case, an excise tax of this character can be maintained, is that the State is conferring or continuing a privilege or opportunity which carries with it an added value, a reasonable portion of which it may retake through the tax. No one will contend that the excise tax law would be valid if in terms it forbade any utility from charging the public enough to pay its operating expenses, nor would it be valid if it forbade the utility from charging more than enough to enable it to earn two per cent. on the investment, for by its terms it would preclude the existence of the value which alone could be the basis for the tax. Unless it confers this, it confers nothing. It must not be forgotten that the tax is not upon the privilege of doing business *in corporate form*, nor upon any corporate franchise or privilege. It is upon the privilege of engaging in the business, whether by individuals, partnerships, or corporations.

If the constitutional limitations applied in the Laylin case are to have any real force, it is apparent that some practical measure of value must be found for the privilege of carrying on the business in question. Such measure cannot be the excess of earning power in the business over

nothing, for, if so, then such excess might be no greater than the tax itself, and the privilege taxed would then consist in an opportunity to carry on an enterprise which brought no return. Nor it is any better if the measure of value should be made the excess of earnings over expenses, including the tax, for, as we have already pointed out, the measure of the value of the privilege is necessarily a relative thing. There must be some outside standard of measurement. We think it is apparent that the only practical and, indeed, the only possible standard is the current rate readily available to the investor. Such is the fair, natural and reasonable measure of value.

The naked question is presented to the court, free from any complication. Thus, it is averred, and is admitted for present purposes, that The Ohio River and Western Railway Company is unable to earn on its invested value a return equal to the returns to be derived from high class investments always readily available on the market. This makes a showing probably in excess to that actually required. It would apparently have been sufficient had we been able to show that the value of such investment was less than that of other investments *of the same class with itself*, readily available on the market. In view of the showing thus made, no claim, of course, can be asserted that the investment afforded by the privilege taxed is of a higher class than the average investment and hence possesses an additional value. Indeed, the only basis for the classification of investments is their income yielding properties, either actual or potential.

Again, it is averred, and hence admitted for present purposes, that the conditions now existing with reference to the business and the investment therein will continue.

Hence it cannot be claimed that there is a prospective value here, and that such prospective value could save the tax.

Nor can it be charged that the lack of value in the privilege is due to mismanagement or unwisdom in the investment, (even supposing that this latter element could be a proper one for consideration) for the averments in the petitions preclude such a supposition.

While there is little or no authority dealing directly with the precise question now under discussion, it finds much support in well settled doctrines of law taken from other but related fields.

Thus, in the law of damages, we find that where the breach of a contract denies to the wronged promisee nothing but what is readily available to him at the same or lower price, he is entitled at most to nominal damages, for the measure of his damages is the difference between the contract price and the market price.

*Sutherland on Damages.* Sections 88-89.
*Warren v. Stoddart,* 105 U. S., 224.
*Dillon v. Anderson,* 43 N. Y., 231.

Practically the same rule is applied in the case of the sale of stock and bonds. Where there is a breach by the vendor, the vendee is entitled to no more than the difference between the contract price and the highest price such stocks or bonds reached on the market in the interval between the time when the delivery should have been made under the contract and the expiration of a reasonable time for going into the market and replacing the same with equivalent securities.

Such is the rule as applied in New York, and, to a limited extent, in the federal courts.

*Gallagher v. Jones,* 129 U. S., 193.

In perhaps a majority of the states, the rule of damages is the difference between the contract price and the market price of the stock at the time and place of delivery.

*Sutherland on Damages*, Section 657.

In the case of Barnes v. Brown et al., 130 N. Y., 371, there was a breach of a contract to assign full paid stock of a certain corporation. Stock not full paid was accepted and returned. The stock stipulated for had no actual or market value at the time the pretended delivery of it was made. It was held that the plaintiff was only entitled to nominal damages, although the defendant, in order to perform the contract, would have been obliged to pay for the stock. The plaintiff's recovery could not exceed the sum that would indemnify him for his loss. As was said by the court:

> "The value of the stock or its pecuniary equivalent was the measure of his injury by the default; and, as it had no value, the plaintiff was awarded complete indemnity by the conclusion of the referee that he was entitled to recover nominal damages only."

The same principle, namely, that the measure of damages resulting from the denial of an opportunity must be determined with reference to the value of other available opportunities, and that where such other opportunities are present and their value is equal to or greater than that of the opportunity denied, no actual damage has been suffered, is also illustrated and applied where damages are claimed for personal injury. The injured party may recover for loss of earning power, but it must be a real loss, and if his disability still leaves open to him avenues of lucrative activity, the damages otherwise recoverable

must to that extent be diminished. It would, of course, logically follow that if other lines of employment or activity, involving equal or greater remuneration than that shut off by his injury, were open and at all times readily available to him, he could recover nothing, so far as earning power was concerned.

See also *Sutherland on Damages*, Section 692.

We submit that these well settled principles taken from the law of damages present, as it were, the other side of the rule for which we are contending in the present case.

Let us suppose that the state, as a contracting party, had offered to plaintiff, in consideration of the payment of tax, the privilege or opportunity of carrying on or continuing a particular business. We will assume that the state breaks its contract and refuses to grant the business privilege, and that it is subject to respond therefor in damages, like an individual. The measure of damages will, of course, be the value of the thing which the state should have granted and which it failed to grant. In the absence of data, the ascertainment of that value might be a matter of difficulty but if the amount of the investment were known, and the return upon that investment which the wrongfully denied privilege would have brought were known, and it were also known that other investments of the same capital were available to the plaintiff which would bring it a better rate of return, then we submit that in any event plaintiff could recover from the state no more than nominal damages.

In other words, when one makes an admittedly bad bargain, he suffers no damage from its repudiation by the other party.

It must not be forgotten that the plaintiffs are not attacking the value of an untried privilege. Had these suits been brought at the time plaintiffs began business, or shortly thereafter, the court might have had some excuse for saying that the plaintiffs should try it out and determine from experience what, if any, value the privilege did possess. Such has been the attitude of the courts in many instances where untried rates were attacked.

*Wilcox v. Consolidated Gas Co.*, 212 U. S., 19.
*Northern Pacific R. Co. v. North Dakota*, 216 U. S., 579.

No such claim can now be made against the plaintiffs. The privilege has been tried and has been found wanting in value. The plaintiffs indisputably would be better off with their capital uninvested than they are in the exercise of the privilege taxed. They are, in fact, giving to the state more than they are receiving. They are respectively devoting to the business, (which is one in which the public has an interest and by which it benefits), an investment—a value—which they could more profitably place in high class securities, where the risk is at a minimum. The capital invested by the plaintiffs is *at the least*, worth annually a rate equal to that which is paid concurrently on the market by high grade securities. Hence when it is invested in an enterprise which denies it an equivalent return in the one case and any return at all in the other, the interests of the owners are being sacrificed at least to that extent. Under such circumstances, the owners do not reap any benefit from the opportunity to enjoy such an investment. It is a positive injury to them, and hence it cannot be said to possess any value.

The principle under discussion finds another illustration in the law relating to local assessments.

This was pointed out in the case of *Southern Gum Company v. Laylin, supra*. There, as here, the power to take is limited by the benefit or value of that which has been given.

An assessment cannot constitutionally exceed the benefits actually conferred by the improvement for which it is levied.

> *Martin v. District of Columbia*, 205 U. S., 135.
> *O'Brien v. Wheelock*, 184 U. S., 450.
> *Shoemaker v. United States*, 147 U. S., 282.
> *Norwood v. Baker*, 172 U. S., 269.

Thus it was said in the case of *City of Allegheny v. Western Pennsylvania R. Co.*, 138 Pennsylvania State, 375-383:

> "In the absence of any such benefit, in a case where we can declare as a matter of law no such benefit can arise, the legislature is powerless to impose such a burden. It would not be a 'tax,' in any proper sense of the term; it would be in the nature of a forced loan, and would practically amount to confiscation."

The measure of the benefit is ordinarily determined by the market value of the property before and after its improvement. As a practical proposition, it is usually necessary to determine such question of value when the improvement is made and before any actual experience with conditions as affected thereby.

Let us suppose a case, however, in which the assessment is deferred until after the effect of the improvement upon the property involved has had an opportunity to show itself; and that as a result thereof it clearly and indisputably appears that the property was worth more without

than with the improvement. Could it be claimed that such property might then be assessed for that improvement?

In the case of *Walsh v. Barron, Treasurer*, 61 Ohio State, 15, cited in the Laylin case supra, the rule is thus stated:

> "The fundamental principle underlying an assessment made on property for the cost and expense of a local public improvement is, that the property is specially benefited by the improvement beyond the benefits common to the public, and that a ratable assessment of the property to the extent of these benefits violates no constitutional right of the owner, and is just and proper. But it can in no case exceed the benefits without impairing the inviolability of private property."

In order to furnish the basis for a local assessment, the special benefit must be direct and immediate and of a pecuniary nature.

Thus in *Hartford v. West Middle District*, 45 Connecticut, 462, it is said by the court:

> "To render the assessment of benefits legal and valid, it must appear that the benefit is direct and immediate, and not contingent and remote."

And again in *Erickson v. Cass County*, 11 North Dakota, 494, 92 Northwestern, 841, it was held:

> "That the assessments authorized to be imposed upon lands by Section 1452 Rev. Codes, are for benefits which are special to the land assessed, and are not what are commonly termed 'conjectural' or 'speculative' benefits."

Other phases of the law of special assessments will be considered subsequently in another connection.

One thing is certain. The Constitution of Ohio definitely limits the power of the legislature in levying an

excise tax on a privilege, to the value of the privilege. Where the privilege taxed consists in the opportunity to carry on a particular business, i. e., the opportunity to devote one's property to a particular use, then it must follow that the value of the business will depend upon and vary with the net returns from that use. No other measure of value is or can be practicable.

To quote again the language of Mr. Chief Justice FULLER, in *Postal Telegraph Company v. Adams*, 155 U. S., 688-697:

> "* * * the value of property results from the use to which it is put and varies with the profitableness of that use."

See also *W. U. Telegraph Co. v. Wright*, 185 Federal 250-257.

If, then, the value of the business varies with and is measured by the profit on the investment which the particular use thereof yields, it necessarily follows that the value of the privilege or opportunity or carrying on that business must be determined by its net earning power—its rate of profit—as compared with the rate of profit open to the investor, irrespective of the privilege. No fairer standard to the state could possibly be applied than that in the present case, viz., the rate of return on high class securities always available on the market, for an investment in securities of a railroad such as that of the plaintiff is obviously far from being a high class one. If the value of the privilege cannot stand by this test, it must inevitably fail.

To have a value, the privilege must confer or continue an earning power otherwise unpossessed or unavailable, for if it does not do so, then it confers nothing.

These principles had been declared by the Ohio Supreme Court in the Laylin case before the present excise tax law was enacted. The legislature must fairly be presumed to have acted with reference to them.

To put it the other way, the tax was intended to reach those public utilities which are, through the opportunity extended them, reaping such an added reward on intrastate business as warrants the state in exacting a contribution therefrom. It was an attempt to reach privilege, not poverty.

Acting upon the widely prevalent notion that many of the public utilities were reaping vast rewards through the privileges involved in their several business enterprises, it was the idea of the legislature to divert a portion of such profits to the public coffer.

It may be asked why the legislature did not expressly exempt utilities in the condition of the plaintiffs. The answer is that very probably it was thought unwise to attempt such a classification, and that it was deemed better to include all and then permit those which, under the constitution were exempt, to assert such exemption in the courts, where all the facts involved could receive adequate consideration.

The District Court, in refusing a temporary injunction, did not dispute the correctness of our standard of value for the business privilege in question. On the contrary, its propriety was, tacitly at least, conceded. Nor was the authority of the value limitation, as laid down in the Laylin case, questioned. The court, however, took the view that a single utility could not avail itself of such limitation as a means of individual protection, but that the limitation was operative only where, throughout the entire field of the

tax, it was true generally that the tax was in excess of the value of the privilege taxed. Thus:

> "The court dealt in that case" (the Laylin case) "with a general law and its operation on all corporations of given classes throughout the state, and not with its operation on specific financially weak corporations of any one of those classes."
>
> *Ohio River & Western Ry. Co. v. Dittey et al., etc.*, 203 Federal, 537-541.

And again—

> "We think it can be confidently asserted that the Supreme Court of Ohio meant by the language employed in the Southern Gum Company case that only those excise tax laws, the result of whose operation is generally confiscatory and oppressive, are unconstitutional, and that it did not intend to say that a law, general and uniform in its operation, is invalid, because in exceptional cases it may impose a hardship." (Page 546.)

When the opinion is analyzed, the only grounds upon which this conclusion is made to rest are found to be the following:

*First:* The case of *State v. Guilbert*, 70 Ohio State, 229.

*Second:* The doctrine laid down in *Western Union Telegraph Co. v. Mayer*, 28 Ohio State, 521.

*Third:* The equality provision in the Ohio Constitution, touching taxation, and certain cases dealing therewith.

*Fourth:* The case of *Adler v. Whitbeck*, 44 Ohio State, 539, dealing with the tax upon trafficking in intoxicating liquors.

*First: State vs. Guilbert*, supra.

This case dealt with an inheritance tax. In the prior case of *State ex rel. v. Ferris*, 53 Ohio State, 314, it had been held that an inheritance tax is an excise tax, and

within the power of the legislature. The tax then under consideration, however, was held unconstitutional, because it undertook to exempt from taxation the right to succeed to estates not exceeding twenty thousand dollars in value, while taxing the whole right of succeeding to estates exceeding that sum in value, and also because it sought to tax at a higher rate the right to succeed to estates of larger value than to estates of smaller value.

In a subsequent case, *Hagerty v. State,* 55 Ohio State, 613, a collateral inheritance tax was upheld as an excise, tax, notwithstanding the fact that it discriminated among collateral kindred, in the sense that the right to inherit by certain classes of collateral heirs was taxed, while the right to inherit by other classes was not taxed; such discrimination having been, in the opinion of the court, justified because of the existence of degrees in collateral kinship.

The only new question before the court in the Guilbert case was whether the inheritance tax law then before it was rendered unconstitutional because of its exemption of estates not exceeding three thousand dollars in value. It was claimed that, inasmuch as Section Two of Article Twelve of the Ohio Constitution, which requires the taxation of property to be by uniform rule and at its true value in money, permits, or then permitted, (for it has since been changed as to amount) an exemption of but two hundred dollars' worth of personal property, such exemption provision should equally limit the right to make exemptions in excise tax laws, and that even if Section Two of Article Twelve did not relate expressly to excise taxes, nevertheless, by analogy at least, it should be held to control, so far as exemptions were concerned, in excise tax

legislation. This claim was refuted by the court, which held that Section Two of Article Twelve was a limitation on the general taxing power inherent in the legislature as such, and related only to the taxation of property, and that inasmuch as the three thousand dollar exemption operated uniformly throughout the state and bore equally upon all persons standing in the same category, it could not be said to deprive anyone of the equal protection of the laws. It is apparent that the court did not have before it, and did not consider, the question of value limitation, dealt with in the Laylin case.

The reasoning of the District Court, based upon the Guilbert case, seems to be that inasmuch as it was there stated that an excise tax operating uniformly throughout the state, and applying equally to all the subjects embraced within its terms, cannot be said to deprive anyone of the equal protection of the law or in any manner to violate the Bill of Rights or any section of the Constitution, the conclusion must follow that the court meant that there was no other constitutional limitation upon the right to levy an excise tax, and that the value limitation, as laid down in the Laylin case, was, for all practical purposes, repudiated.

We think this is an unwarranted conclusion. As we have pointed out, the court was considering only whether it could be claimed successfully that the exemption feature introduced any unwarranted discrimination, and the language quoted must be construed with reference to that fact. It can hardly be thought that the Ohio court, in using the language quoted from the Guilbert case in the opinion of the court below, intended to hold that an inheritance tax which in general or in specific instances ex-

ceeded the value of the inheritance taxed would be enforcible generally or in such particular instances, as the case might be. Yet such would be the logical outcome of the reasoning of the court below. Nothing is said in the language quoted about value limitation or about confiscation; and even appellees, we think, will admit that if an inheritance tax were generally in excess of the value of the inheritances taxed, it would be unconstitutional, as amounting to confiscation.

We submit that the proper view to take of the Guilbert case is that it did not involve the question of value limitation, nor was that question considered, and consequently it did not impair, or, indeed, have any bearing upon the doctrine in that regard enunciated in the Laylin case.

Second: *Telegraph Co. v. Mayer*, 28 Ohio State, 521.

This case dealt with a tax on the privilege of exercising their corporate franchises in Ohio on the part of certain classes of foreign corporations.

The court below in the present case did not claim that the Western Union case was in point, but referred to it as follows:

> "The court, it is true, was speaking of a law affecting foreign corporations only which could exercise none of their powers or franchises within the state, save through comity, or under legislative consent, and which the court found might have been excluded from the state altogether, with which theory we have nothing to do. But it is also true that it recognized the power to raise the necessary funds to defray the legitimate expenses of government by modes other than an ad valorem system of taxation on all property in the state and also the legislative power to create domestic corporations and prescribe the terms upon which they, as well as foreign corporations, might exercise their franchises. The right to extend the tax to domestic corporations undoubtedly existed, as was later held in

> the Southern Gum Co. case, but the Legislature did not see fit to embrace such corporations within the law. It would therefore seem to follow that the language quoted is applicable to all corporations of a given class, and that a law which is of uniform operation as to that class is not repugnant to any constitutional provision, state or federal, although it may bear heavily upon some given individual or individuals falling within its terms."

We respectfully take issue with both the premise and the conclusion embodied in this reasoning. The premise we think involves the fallacy that the tax here involved is a tax upon the privilege of exercising *corporate* franchises or privileges. As we have heretofore pointed out, the present tax is imposed upon the specific privilege of carrying on a business wholly irrespective of whether such business be carried on by a natural person, a partnership or a corporation.

> "The term 'public utility' as used in this act means and embraces each corporation, company, firm, individual and association * * * and herein referred to as express company," etc., etc.
>
> (General Code, Section 5415.)

This error is specially covered in our ninth assignment of error.

The conclusion drawn seems to lose sight altogether of the value limitation. If the court below is correct, then uniformity of operation and applicability to all the members of a given class are the only tests to which an excise tax is subject. If this be true, it eliminates the value limitation absolutely, however construed, and thus comes in conflict with the opinion of the District Court itself touching the proper construction of the Laylin case in that re-

gard. An excise tax law might be applicable by its terms to all the unities composing a given class, and it might have uniform operation as to that class, in that it would include them all. Nevertheless, it might be generally, throughout its field, in excess of the value of the privilege taxed. Yet under such circumstances, if we read the opinion below aright, the District Court would hold the law invalid, under the Laylin case, notwithstanding its uniformity of operation.

In giving to the cases of *State v. Guilbert* and *Telegraph Company v. Mayer* the construction which it did, the District Court, we submit, attempted to prove too much, and logically reached a conclusion which would wholly eliminate the value limitation of the Laylin case, for all purposes. We think that the explanation lies in the fact already adverted to, that the Guilbert and Telegraph Company cases dealt with an entirely different proposition, and involved only the question, what would satisfy the equality requirements of the Constitution as applied to the particular excise taxes then before the court.

*Third:* The view just expressed finds confirmation in what is said generally by the court below in reference to the matter of equality in taxation under the Ohio Constitution.

It is asserted in the opinion that equality in regard to taxation of property is the great idea of the Ohio Constitution, and from this the inference is sought to be drawn that if relief were afforded to individuals nominally subject to an excise tax, because such tax as to them might exceed the value of the privilege taxed, the required equality would thereby be broken.

It is insisted in this connection that there can be no exemption from the burden of taxation unless such exemption is clearly authorized by the Constitution, and that an insolvent must pay his property tax, as well as a man of wealth. This, however, loses sight of the distinction between a property tax and an excise tax which was made in the Laylin case, and which turns upon an inherent difference between the two kinds of taxes. One is a tax upon property and depends upon the ownership of that property and must, under Section Two of Article Twelve of the State Constitution, be imposed by a law of uniform operation and in accordance with a true valuation of property. The right to impose such a property tax does not spring from any special benefit conferred by the taxing authority upon the individual owner, but rather from general considerations growing out of governmental protection and the necessities of government. The tax, however, upon the specific privilege exercised by an individual presupposes the enjoyment by that individual of that privilege; and it must further, under the Laylin case, presuppose the enjoyment of a privilege which is worth at least as much as the tax. The cases cited by the court in the Laylin decision show clearly that the court had in mind the analogy of special assessments, which are limited to the benefit enjoyed by the property assessed, as a result of the improvement for which the assessment is levied. If there is no such benefit, then there is nothing to assess. Nor does the general assessment become invalid, nor is its uniformity broken by the immunity from assessment of the specific property or properties which are unbenefited. If the assessment is uniform among the properties benefited, it is uniform in law and under the Constitution. The ina-

bility of the State of Ohio, under its Constitution, to collect an excise tax on a specific privilege from an individual belonging to the class of those who exercise the privilege, because the privilege of such individual in fact possesses no value, does not affect in any wise the uniform operation of the tax law. There is no exemption of the individual referred to. The tax is simply inoperative as to him, because of the fact that his privilege is valueless. Therefore, he and all others, if any, situated as he is, simply do not come within the operation of the law, because, when the tax law is construed with reference to the Constitution, it must be held to relate only to privileges possessing value, however general its terms. Stress was laid by the court below, in its opinion, upon the impracticability of absolute equality in taxation, whether it be taxation of property or excise taxation, and various authorities are cited in support thereof. This is true, but inapplicable. Take the tax now in question. The more valuable the privilege taxed, other things being equal, the less burdensome will be the payment of the tax, and hence it will operate with greater hardship upon some utilities than upon others. And this cannot be entirely avoided. So long as there is a privilege which possesses value, the state may diminish such value by taking a part thereof in the form of an excise tax; but where the value does not exist, then there is nothing to take; there is nothing upon which the tax can operate.

The appellants in this connection are not seeking relief because as to them the tax is more burdensome than it may be upon some other utilities, but because they are not exercising a privilege possessing value; and hence the State is attempting to take from them something which they do

not possess, namely, an increment of value growing out of the exercise of the specific privilege. This is not discrimination, but confiscation.

The District Court, in its opinion quotes at some length in this connection from the decision by Mr. Justice MILLER in the *State Railroad Tax Cases*, 92 U. S., 575-606.

A careful examination, however, of this opinion discloses that there is nothing in it which militates against our contention, but, on the contrary, it contains some suggestions, at least, which are favorable thereto. The *State Railroad Tax Cases*, so-called dealt with an Illinois tax upon the property of corporations. As applied to railroad companies, it provided for a valuation of their local real and personal property by local taxing authorities, a separate valuation of railroad track, including the right of way, etc., and the rolling stock and other personal property, not local in its character, to be made by a state board. A third and separate valuation was provided for of the franchises and capital stock of the corporation. This was made by the state board. The valuation of the property thus made by the state board, both tangible and intangible, was apportioned among the several taxing districts, in accordance with the railroad mileage therein. The method adopted by the state board in making the third valuation, that is to say, the valuation of the franchises and capital stock, was to first determine the market or fair cash value of the shares of capital stock and fixed indebtedness, and to deduct therefrom the aggregate valuations of the tangible property. It was claimed that this method resulted in an inequality forbidden by the Illinois Constitution; and in support of this claim and this claim only, attention was called to the fact that one of the ap-

pellee companies was insolvent and in the hands of a receiver and unable to pay any interest on its bonds. In discussing this claim, Mr. Justice MILLER uses the language quoted in the opinion of the District Court in the present case.

The *State Railroad Tax Cases* dealt with a property tax. It is true that the capital stock and franchises were taxed thereby, but they were taxed as property, the effort being to reach all of the property of the several corporations, both tangible and intangible. No privileges were taxed as such. That this was the construction placed by this court upon the tax, appears repeatedly in the opinion. Thus, for example, after referring to the tax on the franchises and capital stock, it is said:

> "But it has been a desideratum, perhaps not yet fully attained, to find a method of taxing this species of property which will be at the same time just to the owners of it, equal and fair in its relations to taxes on other property, and which will enforce the just computation that such property should pay for the benefits which, more than property generally, it receives at the hands of government."

And again:

> "The Statute of Illinois, and the rule adopted by the Board of Equalization under the power conferred by the clause we have just recited, may not be the wisest mode of doing complete justice in this difficult matter; but we confess we have, on the whole, seen no scheme which is better adapted to effect the purpose, so far as railroad corporations are concerned, of taxing at once all their property and of making the tax just and equal in its relation to other taxable property of the State."

In Section 1317, page 652, of *Gray's Limitation of Taxing Power and Public Indebtedness*, the Illinois law tax-

ing corporate franchises is designated as a law taxing such franchises as property, and the State Railroad Tax Cases are cited.

It seems to be well settled that franchises may be taxed either as property or as privileges.

Section 47a, page 35. *Gray on Limitation of Taxing Power and Public Indebtedness.*

There is a real distinction here. A franchise treated as property must be regarded as other property, and the individual who owns it can no more escape payment of taxes upon it by reason of his insolvency than can he escape the payment of taxes on his tangible property. The ownership is the controlling element. The distinction between taxes on property and taxes on franchises and privileges, as such is clearly stated in the Laylin case itself. It is there pointed out that taxes on property are subject to certain specific constitutional limitations, which are not applicable to taxes on privileges; and the court then proceeds to enunciate the value limitation as applied to the latter. So that, in any event, the Illinois tax considered in the *State Railroad Tax Cases* was a different kind of tax from that here involved. Nor was the value limitation, as a guaranty against confiscation, then before the court. The only question was whether there was that equality in operation which the Illinois Constitution required. The decision in the *Railroad Tax Cases* was, in the last analysis, really based upon the failure on the part of the complaining railroad companies to do that equity which was prerequisite to equitable relief, in that they had not paid the taxes on their tangible property which they conceded were due, and upon the further ground that the question involved had really been already decided by the Supreme Court of Illinois.

It is interesting to notice that Mr. Justice MILLER evidently had in mind the possibility that cases would arise in which even corporate franchises regarded as property might be valueless. Thus:

> "If taxes were assessable alone on the value of the capital stock and franchises of the corporation, cases might be found where these were worth nothing, and such companies would pay no tax even for their real estate and personal property."

It may be claimed that some language of Mr. Justice MILLER suggests that, so long as the corporate franchise is enjoyed, it must possess some value. The answer to this, however, is:

1. He had in mind such franchises regarded as property.

2. He was considering *corporate* franchises, which, from their very nature, possess elements of value which are almost indestructible.

3. If the suggestion were carried to its logical conclusion and were applicable to the value limitation, as laid down in the Laylin case, it would be necessarily destructive thereto.

If the mere possession of the privilege, in and of itself, conclusively, for all practical purposes, establishes the value of that privilege at whatever the State may choose to fix it, then, of course, all real life is taken out of the value limitation.

We do not believe that the Supreme Court of Ohio intended, in the Laylin case, to merely announce a rule which would be incapable of practical enforcement. We submit that the court's language shows clearly an intention to give such construction to the Ohio Constitution as

would protect the individual possessor of a privilege from a tax on that privilege, as such, which should exceed its value, and that, while in the first instance, the Legislature may be the judge of the value of such privileges, for the purpose of taxing them, as such, the question is one finally for the courts under the Ohio Constitution, as so interpreted. Such is virtually the language used by the court in the Laylin case, and we cannot believe that it may be rendered futile by a construction which would make the possession of a privilege for all practical purposes, conclusive evidence of its value.

*Fourth:* The case of *Adler v. Whitbeck, supra.*

In that case, and others like it, the state liquor tax was held to be valid, as a regulatory and restraining measure, serving the double purpose of discouraging the traffic and creating a revenue to meet the expenses of its regulation. Referring thereto, the court below used the following language:

> "In this respect it is assimilated to the tax here under consideration, whose object is to compensate the state and indemnify the taxpayer for the increased burden resulting from the special inconvenience and expense sustained and the supervisory power exercised by the government over corporate utilities and for the benefit of those who own and operate such."

This involves our tenth and eleventh assignments of error.

This involves the incorrect assumption which we have heretofore referred to, that this is a tax upon corporate franchises, as such. This simply ignores the plain language of the Act, which imposes the tax as an excise upon the privilege of carrying on certain lines of business, whether by individuals, partnerships, or corporations. It

may be conceded, for the purposes of the argument, that a corporation franchise possesses peculiar elements of value. This was adverted to by Mr. Justice DAY in the opinion in *Flint v. Stone-Tracy Company* 220 U. S., 107. The State cannot, however, assert the right to collect the tax, irrespective of the corporate or non-corporate character of the individual from whom it is collected, and then, at the same time, seek to sustain the validity of the tax in a specific instance in which a taxed individual happens to be a corporation, by claiming that its corporate character must be taken into account in measuring the value of the privilege upon which the tax is imposed. It was contended by appellees below that the tax might somehow be treated as a "commutation privilege tax intended to embrace all special privileges, as such." The idea seemed to be that the State, having expressly taxed the privilege of carrying on a particular business, might nevertheless, if the tax exceeds the value of carrying on the business, look to other privileges that might be possessed by the person engaged in the business, and if such other privileges exist and possess value, the tax might be automatically extended to them and thus saved. This, to say the least, is a novel suggestion, and one which we venture to believe the State would find embarrassing, if it should seek in the future, as it unquestionably has a right to do, to levy an excise tax upon any untaxed privileges possessed by any individuals or corporations now engaged in the several kinds of business falling within the present tax. The corporate form is not, as was further contended below, a mere adjunct to the carrying on of the business, and hence impliedly included therein. It involves a separate kind of privilege, possessing elements of value wholly distinct from the business in

which the corporation is engaged. This is clearly pointed out by Mr. Justice DAY in *Flint v. Stone-Tracy Company, supra.* These special elements of value either are or are not the basis of the present tax. If they are, then the tax is applicable only to corporations, but, by its terms, this is not so. If they are not, then their value cannot be used to sustain the tax. It will not do, therefore, to try to engraft upon the value of the privilege of doing business the value of another privilege which happens to be exercised by the same party at the same time, even though that other privilege is for the present untaxed.

It may be mentioned, in passing, that the court, in the Laylin case, must necesarily have had in mind some other measu . even of corporate privilege value than the mere possession or enjoyment of the corporate franchise itself, for the limitation was there laid down in a case where corporate franchises were actually being held and used.

The claim was further made below by appellees that the section of the Act defining gross earnings (Section 5418 G. C.) implies that the tax is upon the corporate franchise of a corporate utility, as such. This claim, however, cannot be sustained. The section referred to reads as follows:

> "The term 'gross earnings' shall be held to mean and include the entire earnings for business done by any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, from the operation of any public utility, or incidental thereto, or in connection therewith. The gross earnings for business done by an incorporated company, engaged in the operation of a public utility, shall be held to mean and include the entire earnings for business done by such company under the exercise of its corporate powers, whether from the operation of the

public utility itself or from any other business whatsoever."

No distinction is here made in the measure of the tax, whether the taxed utility be a corporation or a natural person. It is provided that where the utility is a corporation, its entire intrastate income shall be taken as the measure, because under the law, it must all be necessarily referable to utility operation, or some activity incidental thereto for the corporation can have but one main purpose, and it is not to be presumed that it will engage in ultra vires activities.

*State ex rel. v. Taylor,* 55 Ohio State, 61.

As a safeguard against possible evasion, therefore, and to insure a full return, it is provided that the entire intrastate income shall be returned. In the case of an individual or partnership, however, whose activities are unlimited, different language is employed, though the effect thereof is necessarily the same. In each instance, the gross earnings are the earnings from the operation of the utility, and all other activities in connection therewith.

Coming back to the liquor tax, and what was said by the court below with reference thereto, we submit that it is very clear that the present tax is not imposed for purposes of restraint, or to meet the expenses incident to utility regulation. It is a general revenue measure, and all taxes collected by the state treasurer under its provisions are credited to the general revenue fund.

Section 5491 G. C.

The matter of the regulation of public utilties, and the taxing of them for the purpose of meeting the expenses

thereof, is dealt with by legislation entirely distinct from that now under consideration.

The same Legislature which passed the present Act created the Public Service Commission, and clothed it with full regulatory powers over the same public utilities as are subject to the present tax, this in the exercise of its police power.

Sections 614-1, etc., General Code; 102 Ohio Laws, 549.

That Act amended Section 606 G. C., so that the same reads as follows:

> "For the purpose of maintaining the department of the Public Service Commission of Ohio, and the exercise of police supervision of railroads and public utilities of the state by it, a sum not exceeding seventy-five thousand dollars each year shal be apportioned among and assessed upon the railroads and public utilities within the state, by the Commission, in proportion to the intrastate gross earnings or receipts of such railroads and public utilities for the year next preceding that in which the assessments are made.
>
> "On or before the first day of August next following, the Commission shall certify to the auditor of state the amount of such assessment apportioned by it to each railroad and public utility and he shall certify such amount to the treasurer of state, who shall collect and pay the same into the state treasury to the credit of a special fund for the maintenance of the department of such Public Service Commission."

Thus, it will be seen that the State has separately provided an excise tax for the purpose of meeting the expenses incurred to regulate the utility. Under familiar rules of statutory construction, it is apparent that the present tax was for a different purpose, namely, the pur-

pose which its own terms make plain, that is, the raising of general revenue, under the general taxing power of the State. The seventy-five thousand dollar tax is expressly for the purpose of meeting the expenses incurred in regulating the utilities. It is to be presumed that it is adequate for that purpose, and that, if it should cease to be, the Legislature will in the future, as it has in the past, increase it from time to time.

To impose two taxes of this same character would be, in effect, double taxation, and, while double taxation is perhaps not fatal in the case of excise taxes, nevertheless it is a result always to be avoided whenever any other construction of the statutes involved is possible.

*Tennessee v. Whitworth*, 117 U. S., 129.

Having thus considered the several reasons and authorities advanced by the court below in support of its conclusion that no relief can be afforded to the individual whose tax exceeds the value of the privilege taxed, we submit, with due deference, that they are insufficient.

The Ohio Court, in the Laylin case, declared that, under the Constitution of that State, a privilege tax in excess of the value of the privilege is confiscation, being an infringement of the inviolability of private property guaranteed by Section Nineteen of Article Two.

We contend that the right of private property is an individual and not a class right, and that the constitutional guaranties which protect it are for the benefit of the individual, and may be invoked by him without reference to whether or not the measure in question may confiscate the property of others. Such guaranties are always classed as provisions for the protection of the individual and his property.

*Cooley's Constitutional Limitations*, Seventh Edition, page 65.

We concede that the tax, as a whole, may not be overthrown because, as applied to appellants, it exceeds the value of their privileges respectively, but we insist that, under the Laylin case, they may claim individual protection of their own property from confiscation.

The same rule should be applied, by analogy, as is applied in cases of confiscatory rate regulation. It is now settled that the constitutional guaranties protect an individual railroad (or other utility) against rate legislation confiscatory as to it, and that such legislation is not rendered thereby invalid with respect to other railroads.

*Missouri Rate Cases,* 230 U. S., 474-508.

It is significant that the Ohio court, in laying down the value limitation in the Laylin case, cited, by way of analogy, the case of *Walsh v. Barron,* 61 Ohio State, 15, which is the leading case in Ohio on the limitation of the right to assess property for local improvements, and in which it was held that:

> "The fundamental principle underlying an assessment made on property for the cost and expense of a local public improvement is that the property is specially benefited by the improvement, with the benefits common to the public, and that the ratable assessment of the property to the extent of those benefits violates no constitutional right of the owner, and is just and proper, but it can in no case exceed the benefits without impairing the inviolability of private property."

This makes it plain that the court had in mind those constitutional limitations which may be invoked by the individual for the protection of his property from confiscation. We believe that the constitutional limitations now under consideration should be so applied as to make the

protection which they afford, not merely theoretical, but real, and that the Ohio Supreme Court intended, in applying them to the excise tax here involved, to lay down a tangible line beyond which such taxes may not go. The language of the decision shows very clearly that the court had in contemplation the contingency that a privilege tax might, in some special instances, exceed the value of the privilege taxed, and the further contingency that such value might, in specific cases, not be "continued * * * from year to year," but might vary and shift from time to time. No other possible measure of value will meet these conditions than that which we have presented, namely, the capacity of the privilege to yield profits. No other measure obtains or can obtain in comparing business enterprises or business opportunities. It is the current measure of value, and hence must have been that which the court had in mind.

We submit that the court below did not give full force and effect to the decision of the Ohio Supreme Court in the Laylin case. It is there held that to tax a privilege beyond its value is to confiscate private property. The court below seems to have fallen into the error of confusing this with constitutional requirements touching uniformity in the operation of the tax. Misled by this error, it loses sight of the necessarily individual character of the right of private property, the protection of which the Ohio court really had in mind. Thus the court below was induced to the view that the appellants could not have relief because their cases were, for aught that appears, exceptional, losing sight of the fundamental principle that where the right of property is concerned, the constitution throws its protection around the individual, whether that

individual be a natural or an artificial person, and whether it be weak or strong.

B. Arbitrary and Discriminating Classification.

(This involves the third assignment of error.)

The legislature has the power to make reasonable classifications of occupations in connection with the imposition of an excise tax thereon, and in the exercise of this power it is entitled to use a reasonable discretion. There are, however, certain well established limitations upon this power, growing out of the Fourteenth Amendment to the Federal Constitution and the provisions of the several state constitutions, forbidding class legislation and insuring equality of treatment to all. While these limitations are not always as clearly defined and applied in the decisions as might be desired, nevertheless certain principles based thereon have now become firmly established. Among these are the following:

*First:* The classification must rest upon some reasonable basis. It must not be arbitrary or capricious.

*Second:* Each class must be complete in itself, and must contain all the individuals properly belonging within it.

*Third:* The tax must be uniformly imposed upon all the individuals belonging to the class.

Decisions in support of one or more of these principles will be cited and referred to subsequently in connection with our discussion of the particular questions touching the classification involved in this case.

1. *Failure to include all public utilities engaged in business in Ohio.*

The bills aver that the tax is imposed upon some only, and not all of the public utilities carrying on business within the state. This, for present purposes, stands admitted, and therefore it is hardly necessary to point out instances of utilities which are omitted. Some of those which might, if necessary, be mentioned, are:

Grain Elevators. (*Wyman on Public Service Corporations*, §97.)
*Munn v. People of Illinois*, 94 U. S., 113.
Stockyards (*Wyman*, §100.)
*Cotting v. Stockyards Co. et al.*, 183 U. S., 79.
Ferries. (*Wyman*, §53.)
Bridge Companies (*Wyman*, §53.)
Inn Keepers. (*Wyman*, §106.)

It is true that the relative importance of public utility law has increased in recent years, but the principles involved are of common law origin. Be that as it may, public service law has now reached a stage where the principles which determine whether or not a given enterprise is a public utility are well settled, and as a result the line which separates them from other business undertakings is clearly drawn. (Wyman, §39.) It seems apparent that it was the intention of the act to levy an excise tax on public utilities. For this general purpose, the legislature exercised its power to classify and selected public utilities out of the sum total of valuable lines of business, as the class upon which the excise tax should be levied. Having chosen this class, we submit that it then became necessary to include all members of such class. This was not done. Actuated by some unknown motive, the legis-

lature saw fit to attempt an arbitrary and artificial classification of public utilities, by which same are included and others excluded.

The cases which were cited by appellees below show that this may not be done.

Thus, in the opinion of *Kentucky Railroad Tax Cases*, 115 U. S., 321, it was said:

> "The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially *to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar instances.*"

Again, in *Bell's Gap Railroad Company v. Pennsylvania*, 134 U. S., 232, the court, in upholding the Pennsylvania statute taxing securities issued by corporations at a higher rate than other moneyed securities, places emphasis upon the fact that "all corporate securities are subject to the same regulation."

In *Home Insurance Company v. New York*, 134 U. S., 594, the tax was sustained because, among other things:

> "Under the statute of New York all corporations, joint-stock companies and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. *There is no discrimination in favor of one against another of the same class.*"

In *Clark v. Titusville*, 184 U. S., 329, the court say, referring to the Fourteenth Amendment:

> "The rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it *shall operate on all alike* under the same circumstances."

Practically the same language is employed in deciding the case of *Magoun v. Ill. Trust & Sav. Bank,* 170 U. S., 283.

We submit that having chosen to tax public utilities, it is necessary that all of that class should be included. In their opposition to this claim, it was urged below that the tax is really on the several utilities regarded without reference to each other, and that the legislature did not attempt to tax public utilities as a class.

The best answer to this claim is to read the act as a whole. When the act is thus examined, it will be found to embody a scheme or plan by which public utilities are to be subjected to excise taxation. At the very threshold, the scope of the act is prescribed and its application to public utilities set forth. It is insisted, however, that the term "public utilities" is not used in its legal sense, but in an artificial and arbitrary sense peculiar to this act; that there is "an artificial or original meaning given to the term 'public utility.'" This was the position taken by appellants below so far as the present feature of the case is concerned. This contention, however, cannot have merit unless there is to be an utter sacrifice of substance to form. The principle involved is that in classification for taxation purposes, each class must be complete in itself, and must contain all the individuals property belonging within it. This principle surely cannot be circumvented by an arbitrary definition, for if it can then it is so easy of evasion as to be of no real force or effect. This is apparent, for if the legislature may take such units as it pleases out of a class to which they and other similar units belong naturally, and arbitrarily group them in an artificial class which it will designate by the name prop-

erly belonging to the natural class as a whole, then it follows that the unfortunate units thus selected are denied their constitutional right simply by the medium of a definition.

Suppose that a law were passed, levying an occupation tax on the privilege of carrying on the profession of attorney at law; and suppose that the act provided that for the purposes of the act an attorney at law should mean a practitioner at the bar who is regularly employed by any corporation, or such practitioner who is a graduate of a law school, or any other arbitrary or partial definition of the term. Would it be claimed for a moment that such a tax could stand?

Illustrations of the same character might be multiplied indefinitely.

See e. g. *Beckett v. Mayor,* 118 Ga., 58.

The effect of the present law is as if the tax had in terms been imposed on the privilege of engaging in the business of operating any public utility, and then the omitted utilities had been expressly exempted from the operation of the law. We submit that the legislature cannot take a natural class having well defined legal boundaries and artificially change those boundaries to the prejudice of those it has chosen to include.

The included utilities must compete with the excluded utilities in the money markets and elsewhere, and are thus subjected to a great and constant disadvantage.

2. *The tax does not operate uniformly among the utilities taxed.*

If the legislature has the power to select arbitrarily certain lines of business affected with a public interest and create out of them alone a class for taxation, the members of which are to be known as public utilities, "a class or genus of occupations created by its own fiat," as described by appellees below, then we submit that it must treat every member of that class alike. The legislature either has or has not such power. If it has not, the tax must fall, for reasons already presented. If it has, then such power must be so exercised as that the constituents of the class shall be taxed equally and uniformly.

This has not been done in the present instance. As to electric light, gas, natural gas, water works, telephone, messenger or signal, union depot, heating, cooling, and water transportation companies, the tax amounts to 1.2 per cent. on gross intrastate receipts. As to suburban and interurban railroads, it is fixed at 1.2 per cent, on gross intrastate earnings. On express and telegraph companies it is two per cent. On railroads it is four per cent. It is also four per cent. on pipe line companies.

Having created the class "by its own fiat" for the purpose of excise taxation, and having accorded such unequal treatment to the members thereof, how can the state now consistently claim that "there is no discrimination in favor of one or against another of the same class?" The Act, on its face, shows itself the agency through which gross favoritism and discrimination are brought about.

Suppose that the railroads' tax were figured on fifty per cent. of gross earnings, and all the other "utilities" on

one-tenth of one per cent. Would it be claimed that such discrimination could be practiced in the name of taxation?

Yet such a situation differs in degree only from that which is presented on this record.

It is argued by defendants that the legislature has still further exercised its power of classification and has subdivided or sub-classified the general class of public utilities. It may well be doubted whether, in any event, such a procedure would be warranted in the present instance. Having brought together certain units and created therefrom "by its own fiat" a class for taxation purposes, how can the legislature then disintegrate such class when it comes to fixing the burden of that tax?

Moreover, in making a classification even for purposes of excise taxation, the power of the legislature is not unlimited.

The general rule has perhaps never been better stated that it was by Mr. Justice BREWER, in *Gulf &c. Ry. Co. v. Ellis,* 165 U. S., 150-165:

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based on some reasonable grounds, some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

Where it is the intent to subdivide or subclassify a group of utilities, or, indeed, any kind of business enterprises, all of which are to be taxed for the privilege of carrying on their business, and such subclassification is for the purpose of fixing the rate at which each is to be taxed, the only

legitimate basis for such classification is that of the relative values of the privileges taxed. That and that alone, it seems to us, is the difference which bears a just and proper relation to the attempted classification. To bear a just and proper relation means to so operate as to do justice among the units classified and make the classification proper for the purpose which led to its adoption.

It appears from the averments of the petition that the classification is not according to value; that the privileges taxed on the 4 per cent. basis are not worth any more, or indeed as much as the privilege taxed on the much lower basis. In making its subclassification of utilities, the legislature either was or was not obliged to proceed on the basis of the relative values of the privileges taxed. If it was, then our contention is sustained. If it was not, then it was at liberty to ignore the relation of values and base its classification on some characteristic or characteristics wholly disconnected therewith. But this would be an arbitrary classification, because it would have no reason for existence other than the will of the classifying body.

To return to the realm of assessment law, an assessment which is made must be according to benefits. The assessing body must uniformly, and in accordance with that measure of benefits which it may have legally adopted, impose its assessment. It must uniformly retake from that which it has given. One property owner cannot be assessed in one way and another in another.

*Railroad Co. v. Connelly*, 10 Ohio State, 159.
*Uppington v. Oveat*, 24 Ohio State, 232.
*Jaeger v. Burr*, 36 Ohio State, 164.

Only where there is a substantial difference in the extent of the benefits conferred, can the uniformity be broken.

*Findlay v. Frye*, 51 Ohio State, 390.

The most flagrant instance of improper classification and arbitrary discrimination is found in the attempt to impose a tax at the rate of four per cent. on the business of operating a railroad, and at the rate of 1.2 per cent. on the business of operating an interurban railroad. So far as their business is concerned, and that is the thing taxed, the two enterprises are virtually identical. Their powers are the same. Each may be engaged in any kind of traffic open to the other. Many interurbans use steam, as well as electricity, for motive power. Many railroads employ electricity as well as steam.

The method in which the business is carried on, and not the charter provisions, control, so far as this tax is concerned.

*Railroad v. Poland,* 10 Nisi Prius, n. s., 617.

An examination of the statutes will disclose that an interurban railroad receives from the state and enjoys substantially every privilege which is accorded to any other kind of a railroad. There is no benefit conferred by the state which the plaintiff enjoys, that is not also enjoyed by the interurban which competes with it for traffic. As to the methods of operation, the characteristics which are sometimes thought to distinguish an interurban are all present in the case of the plaintiffs. Thus, the plaintiffs' passenger traffic predominates. Their business is mostly local. They make many stops at short intervals, and much of their business proceeds from stations where there is no agent, the train stopping upon a signal from a passenger. The road of the O. R. & W. is a narrow gauge. Its rolling stock is proportionately small and light. For all practical purposes, its method of operation is identical

with that of a so-called interurban. The mere fact that it happens to use steam as a motive power certainly is not sufficient to put it in a class by itself, when we remember that a so-called interurban may also use steam, and also that there is no reason why this plaintiff might not use electric locomotives instead of steam locomotives. The character of its business would not be affected by such a change, nor would the value of the privilege of engaging in that business be altered. The court will take notice of the fact that the competition between interurbans, so-called, and railroads, so-called, is sharp and constantly increasing. Under the circumstances, to impose upon the railroad company a tax at a rate which is more than three times as great as that of an interurban, is to effect a discrimination in the name of taxation, which, we submit, can neither be excused nor defended.

Courts have frequently been called upon to strike down excise taxes which, like the present one, involved arbitrary or discriminatory classifications.

The rule is well stated in *State v. Moore*, 113 N. C., 697:

> "Uniformity in its legal and proper sense is inseparably incident to the power of taxation, whether applied to taxes on property or to those imposed on trades, professions, &c."

In deciding the case of *Cache County v. Jensen*, 21 Utah, 207, in which a license tax on the business of raising sheep was held invalid, the court say, (page 227):

> "Unjust and illegal discrimination between persons in taxation and the denial of equal justice are within the prohibitions of the constitution of this state and of the United States. No person can be deprived of his property without due process of law."

In *Peoria v. Gugenheim,* 61 Ill. App., 374, the court was dealing with an ordinance which transgressed the rule. It was there held:

> "An ordinance which discriminates between persons of the same class and imposes a penalty for an act done by one person and exempts another who does a like act, is unreasonable and void." (Syl.)

In *Athens v. N. Y. etc. Tel. Co.,* 9 Pa. Dist. Rep., 253, it was held that—

> "a borough ordinance which imposes a license fee of $1 per pole upon all poles used for telephone or telegraph wires within the borough is unconstitutional and invalid, because it discriminates against telephone and telegraph companies in taxing their poles and exempting the poles of electric light and railway companies whose poles are as much within the mischief sought to be remedied as those of the telephone and telegraph companies." (Syl.)

In dealing with a measure taxing peddlers and itinerant merchants, it was held in *State v. Whitcorn,* 122 Wis., 110, that:

> "Sec. 1570 * * * cannot be sustained either as a tax law or as a police regulation. The exemption from its provisions of manufacturers, mechanics, nurserymen, and farmers who have owned the goods they hawk for three months or who actually manufactured or raised the products sold, of dealers in agricultural implements maintaining permanent places of business, of keepers of retail meat markets, of fish dealers, of sellers of fruit and vegetables in cities of the first class, and of persons selling at wholesale or to dealers only, and the discrimination in favor of blind, deaf and dumb, cripples and partially disabled veterans of the War of the Rebellion, are not based upon any legitimate classification germane to the purpose of the law in either aspect, and persons not so exempted are therefore denied the equal protec-

tion of the laws guaranteed both by the federal and the state constitutions."

In *State ex rel. Wyatt v. Ashbrook,* 154 Mo., 375, 77 American State Reports, 765, the court had before it an act which divided all articles of merchandise in classes and such classes into groups. Every merchant, in cities of over fifty thousand inhabitants, desiring to carry on the business of dealing in articles of more than one class or group was required to pay an amount to be fixed (within a certain maximum or minimum) by a commissioner in each city, and receive a license.

The court held that the act was not referable to the police power and must be upheld, if at all, as an exercise of the taxing power.

In holding that the law was an instance of "classification run wild," the following language is used:

> "The protection of liberty and of property, defined in Section 4 of the constitution, supra, 'as the gains of one's industry,' are among the principal objects for which free government among men has been established, and it is further declared in the closing paragraph of said section, 'that when government does not confer this security it fails of its chief design;' and of these rights no person shall be deprived without 'due process of law,' which means, as declared by this as by all courts of the land to be, 'the law of the land,' and these words, when having reference to legislative enactments, must mean a requirement of action or abstinence, binding upon and affecting alike each and every member of the community of the same class or of similar circumstances, enacted for the general public good or welfare. Does the act in question, by the imposition of the license fee provided for therein, infringe upon the liberty of the citizen whom it is to affect, or of this right to the enjoyment of the gains of his industry, or its equivalent, his property?

"If the terms 'life,' 'liberty,' and 'property,' as used in the constitution, are 'representative terms and cover every right to which a member of the body politic is entitled under the law,' as said by Sherwood, J., in *State v. Julow*, 120 Mo., 172, and that within this comprehensive scope are embraced the right to buy and sell as others may, and to pursue such honest calling, vocation, or business as the citizen may choose, subject only to such restraints or the imposition of such burdens as may be required or imposed for the general good, and if 'due process of law' is to be defined as 'the law of the land,' designed to protect and preserve the rights of the citizen against arbitrary legislation as well as against arbitrary, exclusive or judicial action, then 'due process of law' is denied when any particular person of a class of or the community are singled for the imposition of restraints or burdens not imposed upon and to be borne by all of the class, or of the community at large, unless the imposition or restraint be based upon existing distinctions that differentiate the particular individuals of the class to be affected from the body of the community; and this question as to whether the persons thus designated constitute a natural or a reasonable class depends upon facts which the court passing upon the validity or invalidity of the legislation must determine upon. While the legislature under its vested authority and power may arbitrarily impose taxes, restraints, and burdens of various kinds, within the constitutional limitations prescribed, that may become most onerous and oppressive to the citizen, which the courts can do naught but uphold, it cannot create conditions or fiat classes that will operate to make legislation alone applicable to those artificial conditions and classes as general law within the meaning of the constitution, or that will entitle it to the designation of 'the law of the land,' or that will make the act 'due process of law,' by which alone the liberty of the citizens may be restrained, or his property burdened or disposed of."

*Juniata Limestone Co. v. Gagley*, 187 Pa. St., 193, 67 American State Reports, 579, is an interesting case. The

court had before it an act seeking to impose a tax on the employers of foreign born, unnaturalized male persons. In holding the act violative of the Fourteenth Amendment, the court say:

> "The equal protection of the laws declared by the Fourteenth Amendment to the constitution secures to each person within the jurisdiction of a state exemption from any burdens or charges other than such as are equally laid upon all others under like circumstances. Railroad Tax Cases, 13 Federal, 722, 723.
>
> "In that case the court said: 'Unequal exactions in every form or under any pretense are absolutely forbidden, and, of course, unequal taxation, for it is in that form that oppressive burdens are usually laid. It is idle to suggest that the case in hand is one of proper legislative classification. A valid classification for the purpose of taxation must have a just and reasonable basis, which is lacking here;' Gulf &c. Ry. Co. v. Ellis, 165 U. S., 150-65. In the last cited case, Mr. Justice Brewer said, 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable grounds, some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.'"

In *W. U. Telegraph Co. v. Wright*, 185 Federal, 250, a franchise tax, the net return from which in the taxing state was but $1821.99, was held to be void because "excessive, discriminatory and unjust."

In *State v. Heinnan*, 65 N. H., 103, 23 A. S. R., 22, the first syllabus reads:

> "A statute which selects particular individuals from a class or locality and subjects them to peculiar rules or imposes upon them special obligations or burdens from which others in the same class or locality are exempt is unconstitutional."

In *Barber v. Connolly,* 113 U. S., 27, the court say of the Fourteenth Amendment, that it

> "undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property, but * * * that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling or condition."

Again, in *Minneapolis Ry. Co. v. Beckwith,* 129 U. S., 26, it is said by Mr. Justice Field:

> "Equality of protection implies not merely equal accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others in like condition from charges and liabilities of every kind."

The arbitrary sub-classification now under consideration bears with crushing force upon the plaintiffs, because they are both small, local roads, doing very little interstate business, and hence the tax is computed upon practically their entire earnings. It is a matter of common knowledge that local transportation movements are relatively much the more costly and correspondingly less remunerative, and consequently the value of engaging in a railroad business confined thereto is much less than that of engaging in railroad operations which are extensive in their character and involve through movements of freight and passenger traffic.

Instead of attempting a classification based on value or even approximating it, the law has been so drawn as that in operation it exacts the heaviest excise from those whose operations are the least valuable. It assumes the greater value, when in fact there is the less.

This highly inequitable and inconsistent result is obviously due in part to the effort on the legislature's part to frame a law that would exact from railroad companies in the aggregate a total excise tax which would equal that received under the so-called Cole law, and nevertheless not violate the commerce clause of the Federal Constitution, as did the Cole law. This leads us to a consideration of the next assignment of error.

C. The Law, as Applied to Railroads, Lays a Burden Upon Interstate Commerce.

(Fourth assignment of error.)

Our claim is that the so-called Cole law, under which each railroad, prior to the Act of May 10, 1910, was compelled to pay a tax equal to one per cent, of its entire gross earnings computed by multiplying the average gross earnings per mile over the entire system by the number of miles in Ohio, was obnoxious to the commerce clause of the Federal Constitution; and that the Act of May 10, 1910, while it made the tax expressly an excise upon the privilege of carrying on business within the state and provided that the computation should be based solely on intrastate earnings, nevertheless, by leaving the percentages of the other utilities substantially as they were and multiplying that of railroads and pipe line companies (which were notoriously the utilities extensively engaged in interstate commerce) fourfold, condemned itself as an open and flagrant attempt to evade the bar of the commerce clause and created, in substance if not in form, a burden on interstate commerce.

Since this case was heard below, a state court has held that the Cole law was unconstitutional, resting its decision

largely on *Galveston etc. Ry. Co. v. Texas*, 210 U. S., 217. We anticipate that its unconstitutionality will now be virtually conceded by appellees, and hence will pass that question, which was elaborately argued below.

The case of *Galveston etc. Ry. v. Texas, supra*, was decided May 18, 1908. As a matter of common knowledge, it was regarded generally as determining the unconstitutionality of the Cole law, so far as railroads engaged in interstate commerce were concerned. It is more than significant that the present act, in its original form, was passed at the next regular session of the legislature.

The present Act, although enacted May 31, 1911, is a re-enactment without material change; so far as present purposes are concerned, of the original act of March 10th, 1910. The Act of March 10th, 1910, repealed the Cole law. The Cole law imposed a uniform tax of one per cent. on all gross earnings, both state and interstate, upon the same public utilities that are involved in the present tax. The Act of March 10th, 1910, increased the percentage in accordance with which the taxes were to be severally determined as follows: Railroad companies and pipe line companies, from one to four per cent.; express and telegraph companies, from one to two per cent.; all other utilities, from one to one and one-fifth per cent. Instead of taking all the gross earnings, the new percentages were to be applied only to intrastate earnings.

We contend that the enormous increase in the percentage of railroads and pipe line companies was due to the fact that it was conceived that about three-fourths of their business was interstate, and that therefore a tax of four per cent. on the intrastate earnings would about equal a tax of one per cent. on the total; in other words, that the

tax was increased four-fold because such utilities were engaged in interstate commerce.

A good deal of light is thrown upon this proposition in an opinion rendered to the Governor and each of the committees on finance, judiciary, and taxation, in the Senate and House; under date of March 5th, 1910; (Ohio Executive Documents, Part II, 1910, page 168.) The opinion is a long one. In brief, it set forth the dilemma which the state officials had found themselves in by reason of the probable unconstitutionality of the Cole law, under the then recent decision of this Court in the case of *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, supra.* It called attention to the large loss of revenue which would result to the State if the Cole tax were declared unconstitutional, and cited the instance of the Buckeye Pipe Line Company, which had, since the Texas decision, refused to pay that portion of its Cole tax measured by its interstate commerce, which portion was about three-fourths of the total. The opinion proceeds to suggest, in somewhat guarded fashion, the advisability of new legislation, which should avoid the doubtful features of the Cole law, and, at the same time, produce an equal amount of revenue for the State.

We call attention particularly to the following extracts from the opinion:

"Gentlemen:

"This communication is sent to you because of a situation with which this department has been confronted since the latter part of December, 1908, a situation which in the end may seriously affect the revenues of the state and of its political sub-divisions.

"The matter involves the validity, * * * of * * * the 'Cole excise tax law' * * *.

"The Buckeye Pipe Line Company is a corporation incorporated and organized under the laws of Ohio * * * and is subject to the provisions of the Cole law. * * *

"In the month of May, 1908, this company made its report to the auditor of state giving its gross receipts for business done in Ohio during the year preceding that month as $9,099,969.00. * * * "After this decision" (the Texas case) "the Buckeye Pipe Line Company sent to the Auditor of State an amended report setting forth that of the more than nine million dollars of gross receipts returned by it, as stated above, $7,099,969.00 was receipts from interstate business, and that the receipts of the company from business done wholly within Ohio amounted to $2,000,000, and it asked for a hearing upon this report, claiming that it should not be required to pay an excise tax of more than one per cent. of the gross receipts realized from business done wholly within the State of Ohio."

The opinion then calls attention to the practical difficulty presented by the claim of the Buckeye Pipe Line Company, in that if it were given publicity, through litigation, all the other utilities engaged in interstate commerce would refuse to pay their Cole tax until such time as the question is determined, and thus the State would be deprived, in the meantime at least, of a large amount of revenue. To meet this difficulty temporarily, the opinion recites that the Attorney General's Department had refrained from bringing suit against the Buckeye Pipe Line Company, with a view to postponing the crisis to such time as the Legislature might be in session, but that it was felt that such a policy could no longer be continued with justice to other utilities, and that therefore the question of the validity of the Cole tax must now be tested out in the courts.

The opinion, while it does not concede the invalidity of the Cole law, expresses very grave doubt as to whether it could be sustained.

"In suggesting possible remedies under which excise revenues may be continued through constitutional laws I would not be understood as recommending the collection of a greater amount of revenue into the state general revenue fund than is being now collected or rather that was being collected before the recent falling off of revenues under the Aiken Liquor Tax.

* * *

"So far ,therefore, as the validity of the Cole law in its present form is concerned, my conclusion is that there is nothing to do in our case except to await the outcome of our proposed suit which will test that question. In the meantime, however, I am clearly of the opinion that the General Assembly may readjust these franchise or excise tax laws, that is the Cole and Willis law, and that they may adopt any one of the following plans:

(a) They may require each of the public service corporations subject to the Cole law to pay an excise tax to the state, measured by taking some rate higher than one per cent. of the gross receipts or earnings of such companies realized from intrastate business and excluding interstate business and business done for the federal government.

(b) Or they may reasonably classify these public service corporations and require one class to pay such franchise tax at one rate and another class at a different rate, the tax to be measured in each case, of course, through the gross receipts received from intrastate business and excluding the receipts from interstate business and business done for the federal government. This classification would be according to kinds or nature of the business.

* * *

"How much of this shortage of a million and a quarter dollars, or the two milion dollars if you consider the shortage of $700,000 under the operation of

> the local option law, may be made up by an increase in the rates of excise tax on intrastate business, I am not able to say, because at this time I am not advised as to the relative amounts of intrastate business and interstate business done by the several public service corporations aside from the Buckeye Pipe Line Company. Many of these corporations do not keep a separate account of these two classes of business, and any administrative tax law which shall be passed should give the power to the tax commission to require this information to be given."

The opinion concludes with a discussion of proposed reformations in connection with property taxes, and administrative measures for their collection.

When the entire situation is looked to, we submit that there can be no escape from the conclusion that the tremendous increase in the tax, as applied to railroads, was a mere device by which it was sought to do in effect what could not be done in terms, namely, to continue to lay a burden upon interstate commerce. The old basis of computation provided for in the Cole law had to be changed, for it had been held unconstitutional. Under the Cole law there was a basis of computation provided, together with a unit of percentage as applied to railroads. The result of the Texas decision was to render that basis invalid. In an effort to evade the constitutional limitation, the legislature changes the basis, reducing it so as to make it conform with the Texas decision, and then correspondingly increases the unit of percentage, so as to make the net result the same. In other words, having been forced to reduce the multiplicand, the multiplier is proportionately increased and the product is preserved. We submit that this is a flagrant attempt to accomplish an unconstitutional result by indirection, that it is not a bona fide

attempt to reach a taxable privilege, but, rather an unlawful effort to burden a privilege that is non-taxable under the Federal Constitution.

The Federal Courts are, we think, becoming increasingly alert in detecting and striking down attempts of this kind, and they do not hesitate to look through the form to the substance and effect of taxing statutes. This is but one application of the rule that states will not be permitted to pass laws intended to burden interstate commerce, even though such intent is disguised by specious phraseology.

Thus it is said by Mr. Justice HARLAN, in rendering the opinion of the court in the case of *Brimmer v. Rebman*, 138 U. S., 78:

> "Undoubtedly, a state may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting inspection laws, make discriminations against the products and industries of some of the states in favor of the products and industries of its own or of other states."

In deciding the case of *United States Express Co. v. Minnesota*, 223 U. S., 335, the following language is used by Mr. Justice DAY, page 344:

> "The difficulty has been, and is, to distinguish between legitimate attempts to exert the taxing power of the state and those laws which, though in the guise of taxation, impose real burdens upon interstate commerce as such. This difficulty was recognized in *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas* 210 U. S., *supra*, wherein the possible differences between the decisions in *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S., *supra*, and *Maine v. Grand Trunk Ry. Co.*, 142 U. S., *supra*, were commented upon and explained."

And again at page 348:

> "Upon the whole, we think the statute falls within that class where there has been an exercise *in good faith* of a legitimate taxing power, the measure of which taxation is in part the proceeds of interstate commerce, which could not, in itself be taxed, and does not fall within that class of statutes uniformly condemned in this court, which show a manifest attempt to burden the conduct of interstate commerce, such power, of course, being beyond the authority of the state."

Whenever the law making power, whether it be Congress or a state legislature, attempts to accomplish a purpose which is unconstitutional, the courts will not hesitate to strike down the result of such an attempt, even though the unlawful purpose may be disguised. This was recognized by Chief Justice MARSHALL, in McCulloch v. Maryland, 4 *Wheaton*, 316, in which he said:

> "Should Congress under the pretext of exercising its powers pass laws for the accomplishment of objects not entrusted to the Government it would become the painful duty of this tribunal, * * * to say that such an act was not the law of the land."

In the case of *Mugler v. Kansas*, 123 U. S., 623, Mr. Justice HARLAN, in pronouncing the opinion of the court, uses the following impressive language:

> "The courts are not bound by mere forms nor are they to be misled by mere pretenses. They are at liberty—indeed are under the solemn duty—to look at the substance of things whenever they enter upon the inqury whether the legislature has transcended the limits of its authority."

The General Assembly of Ohio, as incident to its general legislative powers, possesses the power to tax. This power, however, may not be used for an illegitimate pur-

pose or to accomplish that which is forbidden by the paramount law of the land. In the present instance we claim that it has attempted to do this, and that, under all the circumstances, it is apparent that the four per cent. tax was prescribed for the purpose of continuing a burden upon interstate commerce which had first been created by the then discredited Cole law.

D. The Law is in Effect a Double Tax Upon Property, and Hence is Lacking in Uniformity, and is a Denial of the Equal Protection of the Law.

This involves the sixth assignment of error.

Section Two of Article Twelve of the Ohio Constitution requires the taxing of property by a uniform rule.

We present this assignment of error as an alternative assignment, for consideration in the event that appellees, in response to our argument heretofore advanced in connection with the *State Railroad Tax Cases*, should take the position that the value of a franchise or privilege as property and its value as a privilege are identical. If such position be taken, then we submit that, under this assignment of error, appellees at best would only escape from one error to another. If the values are identical, then the present is, for all practical purposes, an additional tax on property already taxed as a part of an operating unit.

It appears very clearly from the decisions dealing with the so-called Nichols law, (the provisions of which are now applied to all the so-called utilities) that the intention is to reach all those intangible values which arise out of the fact that the tangible property is used in carrying on a business of a specific character.

*Adams Express Co. v. Ohio State Auditor*, 165 U. S., 194. Same case on rehearing: 166 U. S., 185.

It must be conceded by appellees that a double tax on property would be violative of Section Two of Article Twelve of the Ohio Constitution, and, if so, then an attempt to seize property for the purpose of satisfying such an illegal exaction would constitute the taking of property without due process of law, and would also deny to the owners thereof the equal protection of the law.

E. The Tax is in Contravention of the Commerce Clause of the Federal Constitution, in that it is Imposed Upon Gross Receipts from Foreign Commerce.

(Fifth assignment of error.)

The appellees aver that appellants are engaged in foreign commerce. It will, we think, be virtually conceded by appellees that if, as in the case of the Cole law, the tax were based upon entire gross receipts, without excepting those attributable to interstate operations, it would be invalid.

We are thus led to the question whether receipts from foreign commerce must not also be excluded. The commerce clause of the Federal Constitution confers upon the national authority the power to regulate commerce,—(a) with foreign nations; (b) among the several states; and (c) with the Indian tribes. The power extends equally to each of the three classes of commerce, and each of these classes is distinct from the other.

In the case of *Veazie et al. v. Moor*, 14 Howard, 568-573, Mr. Justice Daniel, delivering the opinion of this court, uses the following language, referring to the powers conferred upon the national government by the commerce clause:

> "These categories are, 1st. Commerce with foreign nations. 2d. Commerce amongst the several States.

> 3d. Commerce with the Indian tribes. Taking the term 'commerce' in its broadest acceptation, supposing it to embrace not merely traffic, but the means and vehicles by which it is prosecuted, can it properly be made to include objects and purposes such as those contemplated by the law under review? Commerce with foreign nations must signify commerce which in some sense is necessarily connected with these nations, transactions which either immediately, or at some stage of their progress, must be extraterritorial. The phrase can never be applied to transactions wholly internal, between citizens of the same community, or to a polity, and laws whose ends and purposes and operations are restricted to the territory and soil and jurisdiction of such community.
>
> * * *
>
> "The rule here given with respect to the regulation of foreign commerce, equally excludes from the regulation of commerce between the states and the Indian tribes the control over turnpikes, canals, or railroads, or the clearing and deepening of water-courses exclusively within the States, or the management of the transportation upon and by means of such improvements."

See also *Lord v. Goodall, Nelson & Perkins Steamship Co.*, 102 U. S., 541.

Inasmuch as the State of Ohio borders upon one of the Great Lakes, some of the foreign commerce initiated in that state moves directly therefrom to its foreign destination, without passing through any other states of this Union, and hence is foreign commerce in the strictest sense of the term.

There can be no doubt but that the receipts or earnings derived by the railroads from such foreign commerce must be included in the gross upon which the tax is based.

Section 83 of the act (Section 5472, G. C.), is as follows:

> "In the case of each railroad company, such statement shall also contain the entire gross earnings, in-

cluding all sums earned or charged, whether actually received or not, for the year ending on the thirtieth day of June next preceding, from whatever source derived, for business done within this state, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government. Such statement shall also contain the total gross earnings of such company for such period in this state from business done within this state."

Section 88 (Section 5477, G. C.) is as follows:

"On the first Monday of October, the commission shall ascertain and determine the gross earnings as herein provided, of each railroad company whose line is wholly or partially within this state, for the year ending on the thirtieth day of June next preceding, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government. The amount so ascertained by the commission shall be the gross earnings of such railroad company for such year."

The gross earnings so ascertained constitute the basis for the four per cent. tax. Inasmuch, therefore, as no deduction of the earnings from foreign commerce is provided for, we claim that the result is as fatal to the law as if there had been a failure to deduct earnings from interstate business, and that this necessarily follows from the equal and co-extensive power of the national government over both. The fact, if it be such, that the proportion of foreign commerce carried on by the railroads is relatively small, can make no difference. The principle involved is the same, whether the proportion be large or small. Nor can the earnings attributable to foreign commerce be separated from the total gross earnings and the tax sustained as to the remainder. The law does not provide for or contemplate such a separation, and it must be

judged as it is. It is as incapable of judicial reconstruction in this respect as the law before the court in the case of *Meyer, Auditor of the State of Oklahoma, v. Wells, Fargo & Company,* 223 U. S., 298, where this court, through Mr. Justice Holmes, used the following language with reference to the state tax law:

> "Whether the statute could be construed as separable of course would be ultimately for the state court in any event. *Telegraph Co. v. Texas,* 105 U. S., 460. But we see no possible construction on which it could be upheld without being so remodeled that it would be a mere speculation whether the legislature would have passed it in the new form. For, to recur to the statute, it is not simply a tax on all gross receipts within the state, which possibly might be read as intended to reach such receipts as it could, even if less than all, *Ratterman v. Western Union Telegraph Co.,* 127 U. S., 411, it is a tax on a proportion of total gross receipts a considerable part of which, as we have explained, the State has no right to tax. Neither the court below nor this court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent."

The present act is very explicit as to deductions which are to be made, and there are two only: Receipts arising wholly from interstate business, and receipts arising from business done for the federal government. Whether the law would have been passed at all in its present form, if other deductions had been made or contemplated, is, at best, merely a matter for speculation.

It may be contended that, in order to save the statute, the court should give to the word "interstate" business, as used in the state statute, a meaning broad enough to include foreign business as well.

It is true that the word "state" has sometimes been held broad enough to include foreign states, but this has been usually in connection with some treaty provision with a foreign government. In the present instance, the word "interstate" was clearly used in the same sense that the phrase "among the several states" is used in the commerce clause of the Federal Constitution. It was early decided that the word "state," when used in the Constitution, cannot be taken in its broadest signification, but is limited to those several sovereign states which comprise the Union.

A leading case is *Hepburn and Dundas v. Ellzey*, 2 Cranch, 445. Deciding that case, it was said by Mr. Justice Marshall:

> "The question in this case is, whether the plaintiffs, as residents of the District of Columbia, can maintain an action in the Circuit Court of the United States for the District of Virginia.
>
> "This depends on the act of Congress describing the jurisdiction of that court. That act gives jurisdiction to the Circuit Courts in cases between a citizen of the state in which the suit is brought, and a citizen of another state. To support the jurisdiction in this case, therefore, it must appear that Columbia is a state.
>
> "On the part of the plaintiffs it has been urged that Columbia is a distinct political society; and is, therefore, a 'state' according to the definitions of writers on general law.
>
> "This is true. But as the act of Congress obviously uses the word 'state' in reference to that term as used in the constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument. The result of that examination is a conviction that the members of the American confederacy only are the states contemplated in the constitution."

The Constitution gives Congress power to regulate commerce "among the several states" and "with foreign nations." The former phrase has been compacted into the words "interstate commerce", and the latter into the words "foreign commerce."

In providing for the deduction of earnings arising from interstate business, the state statute must be construed as if it provided for deduction of earnings arising from business among the several states.

In the case of *Eidman v. Martinez*, 184 U. S., 578, Mr. Justice Brown, in delivering the opinion of the court, said:

> "It need only be added that while the words 'state or territory' are used in treaties, and perhaps also in some of the acts of Congress regulating our international relations, as including foreign states, they are used in the Constitution and in ordinary acts of Congress as applying only to states or territories of the United States."

F. The Act is Unconstitutional Because of its Effort to Prevent Judicial Inquiry and Force Obedience to its Terms and Administrative Acts Thereunder, Irrespective of Their Validity.

(This involves our seventh assignment of error.)

An examination of the provisions of the Act shows very clearly an intention to prevent any utility from questioning and having determined, by due course of law, the validity either of the Act itself or of any tax levied thereunder.

Section 102 of the Act (Section 5491, G. C.) provides for a fifteen per cent. penalty in the event of non-payment of the tax before the fifteenth of December in each year.



Section 103 (Section 5492, G. C.) is as follows:

"Such taxes or fees and penalties thereon may be recovered by an action in the name of the state, which may be brought in the Court of Common Pleas of Franklin county, or of any county, in which such corporation has an office or place of business, or in which such public utility is doing business, or the line of any street, suburban or interurban railroad company or railroad company is located, and such Court of Common Pleas shall have jurisdiction of such action regardless of the amount involved therein. The attorney general, on request of the commission, shall institute such action in the Court of Common Pleas of Franklin county, or of any of such counties as the commission may direct. In any such action it shall be sufficient to allege that the tax, fee or penalty sought to be recovered, stands charged on the delinquent duplicate of the treasurer of state, and that the same has been unpaid for a period of thirty days after having been placed thereon. Sums recovered in any such action shall be paid into the state treasury, to the credit of the general revenue fund."

Section 120 (Section 5509, G. C.) is as follows:

"If a corporation, wherever organized, required by the provisions of this act, to file any report or returns or to pay any tax or fee, either as a public utility or as a corporation, organized under the laws of this state, for profit or as a foreign corporation for profit doing business in this state and owning or using a part or all of its capital or plant in this state, or as a sleeping car, freight line or equipment company, fails or neglects to make any such report or return or to pay any such tax or fee for ninety days after the time prescribed in this act for making such report or return or for paying such tax or fee, the commission shall certify such fact to the secretary of state. The secretary of state shall thereupon cancel the articles of incorporation of any such corporation which is organized under the laws of this state. by appropriate entry upon the margin of the record

thereof, or cancel the certificate of authority of any such foreign corporation to do business in this state by proper entry. Thereupon all the powers, privileges and franchises conferred upon such corporations, by such articles of incorporation or by such certificate of authority, shall cease and determine. The secretary of state shall immediately notify such domestic or foreign corporation of the action taken by him."

Section 121 (Section 5510, G. C.) is as follows:

"Any person or persons who shall exercise, or attempt to exercise, any powers, privileges or franchises, under the articles of incorporation or certificate of authority, after the same are canceled, as provided in section one hundred and twenty of this act, shall be fined not less than one hundred dollars nor more than one thousand dollars."

Section 123 (Section 5512, G. C.) is as follows:

"In addition to all other remedies for the collection of any taxes or fees due, under the provisions of this act, the attorney general shall, upon the request of the commission, whenever any taxes, fees or penalties due, under this act, from any public utility or corporation shall have remained unpaid for a period of ninety days, or whenever any corporation or public utility has failed or neglected for ninety days to make or file any report or return, required by this act, or to pay any penalty for failure to make or file such report or return, apply to the Common Pleas Court of Franklin county, or of any county in the state in which such public utility or corporation is located or has an office or place of business, for an injunction to restrain such public utility or corporation from the transaction of any business within this state, until the payment of such taxes or fees and penalties thereon, or the making and filing of such report or return and payment of penalties for failure to make or file such report or return, and the costs of such application, which shall be fixed by the court.

Such petition shall be in the name of the state, and if it is made to appear to the court, upon hearing, that such public utility or corporation has failed and neglected, for ninety days, to pay such taxes, fees or penalties thereon, or to make or file such reports or returns, or to pay such penalties for failure to make or file such reports or returns, such Court of Common Pleas shall grant and issue such injunction. All actions brought under this act shall have precedence over any civil cause of a different nature pending in such court, and the Court of Common Pleas shall always be deemed open for the trial of any such action brought therein."

Section 124 (Section 5513, G. C.) provides for proceeding against delinquent utilities by quo warranto. It is as follows:

"If any corporation fails or neglects to make and file the reports or returns, required by this act, or to pay the penalties provided in this act for failure to make and file such reports or returns, for a period of ninety days after the time prescribed in this act, the attorney general, on request of the commission, shall commence an action in quo warranto, in the Circuit Court of Franklin county, or of any county in this state in which such corporation is located or has an office or place of business, to forfeit and annul its privileges and franchises. If the court is satisfied that any such corporation is in default as aforesaid, it shall render judgment ousting such corporation from the exercise of its privileges and franchises within this state, and shall otherwise proceed as provided in Chapter One of Title VIII, Part 3, of the General Code."

Section 158 (Section 12924-5, G. C.) is as follows:

"Every day during which any public utility, company, corporation, association, firm, co-partnership, officer or individual, subject to the provisions of any law which the tax commission of Ohio is required to administer, or any officer, agent or employe thereof

> shall willfully fail to observe and comply with any order or direction of such commission or to perform any duty enjoined by such law, shall constitute a separate and distinct offense."

It is apparent that so far as any corporation is concerned at least, an attempt to contest the validity of the act or to resist the collection of an excise tax levied thereunder would necessarily defeat itself, for the existence of the corporation and its power to engage in any corporate activity would, under Section 120, have been terminated long prior to the time within which such questions could be judicially determined, and an attempt on the part of any of its officers or agents or representatives to thereafter continue the contest would subject them to the fines and penalties of Section 121, which, when accumulated under Section 158, would be enormous. The effect of the act, so far as corporations are concerned, is therefore to force obedience to its terms and to any administrative act which may be done thereunder, upon the penalty of death in case of refusal or resistance.

The scheme of coercion is completed by the provisions of Section 33 (Section 1465-31, G. C.), to the effect that

> "No injunction shall issue suspending or staying any order, determination or direction of the Commission, or any action of the auditor of state, treasurer of state, or attorney general, required by law to be taken in pursuance of any such order, determination or direction, but nothing herein shall affect any right or defense in any action to collect any tax or penalty."

As we have already pointed out, the last clause of this section would be practically inoperative, because the corporate existence of the contesting utility would be terminated long before the question could be settled.

The case of *Ex parte Young*, 209 U. S., 123, with the cases cited in its opinion, would seem to furnish ample authority to sustain our claim that these coercive portions of the act at least, if not the act as a whole, are unconstitutional. In that case, the penal provisions of the Minnesota statutes involved in the so-called Minnesota rate case were held unconstitutional, on the grounds that they were calculated to prevent a judicial investigation and determination of the validity of the rates established by the legislature, or its creature, the state commission, and amounted, in effect, to an attempt to make such rates final and irreviewable. We quote the following passages from the opinion by Mr. Justice Peckham:

> "The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity. The officers and employes could not be expected to disobey any of the provisions of the acts or order at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company. The observations upon a similar question, made by Mr. Justice Brewer in Cotting v. Kansas City Stock Yards Co., 183 U. S., 79, 99, 100, are very apt. At page 100 he stated: 'Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that upon a failure to make good that claim or defense, the penalty for such failure either appropriates all his property or subjects him to extravagant and unreasonable loss?' Again, at page 102, he says: 'It is doubtless true that the state may impose penalties such as will tend to compel obedience to its mandates by all individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the legisla-

ture, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws.' * * * In McGahey v. Virginia, 135 U. S., 662-694, it was held that to provide a different remedy to enforce a contract, which is unreasonable, and which imposes conditions not existing when the contract was made, was to offer no remedy; and, when the remedy is so onerous and impracticable as to substantially give none at all, the law is invalid, although what is termed a remedy is in fact given. * * * If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S., 418. A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as work an abandonment of the right rather than face the conditions upon which it is offered or may be obtained is also unconstitutional."

The court points out further that in the case of the making of a rate, the power of the legislature is not complete, but that its exercise is always in the last analysis subject to judicial review. This, of course, is also true of the power to levy excise taxes, for while the determination of values, upon which alone such taxes can be assessed, is primarily with the legislature, it is "finally in the courts." *Southern Gum Co. v. Laylin, supra.*

Section 33 is also probably unconstitutional upon other grounds.

The collection of any other tax may be enjoined upon a proper showing, and the state courts are open for that purpose. But those upon whom this particular tax is imposed

are denied injunctive relief, however clear their rights and however persuasive the equities in their favor may be. Possibly, the legislature could destroy entirely the equity jurisdiction of the state courts, but it cannot, while that jurisdiction remains, deny to anyone the right to invoke it. It cannot say that the right to equitable relief shall be enjoyed under some circumstances which would entitle one to it, and shall be denied under other circumstances which equally would entitle one to it. This would be, in effect, closing the court, so far as that jurisdiction is concerned, to a disfavored class.

Attempts have sometimes been made to forbid courts of equity from exercising their jurisdiction in certain cases, for example, in labor disputes, but such laws have uniformly, so far as we know, been held invalid.

*Goldberg, Bowen & Co. v. Stablemen's Union,* 86 Pacific, 806.
*Pierce v. Stablemen's Union,* 103 Pacific, 324.

In the case last cited, the court say, referring to a statute of this kind:

> "Not only would it be void as violative of one's constitutional right to acquire, possess, enjoy and protect property, but as well would it be obnoxious to the Constitution in creating arbitrarily and without reason a class above and beyond the law, which is applicable to all other individuals and classes."

Viewed from another constitutional standpoint, the attempt to prescribe upon what state of facts a court of general equity jurisdiction shall not exercise such jurisdiction and grant relief is an attempted exercise of judicial power which is expressly forbidden by our constitution.

It is significant to note that the Supreme Court of Ohio, in the case of *State ex rel. v. Jones, Auditor,* supra, held

that due process of law was not denied by the Nichols law because of the opportunity which was open to test its validity by injunction.

51 Ohio State, 492; particularly pages 516, 517 and 518.

After citing the case of *Davidson v. New Orleans*, 96 U. S., 97, and *Jones v. Davis*, 35 Ohio State, 474, the court say:

> "So that, in the case of an express company, after the board of appraisers and assessors has certified to the county auditor the amount proportioned to his county of the value of the company's property, and before the county auditor has proportioned the amount among the several taxing districts, and placed the same on the tax lists to be assessed and collected as taxes are assessed and collected on other property, an injunction will lie in favor of the company, to enjoin the auditor from carrying such amount upon the duplicate, and thereby afford an opportunity to inquire into the legality of the assessment before a lien attaches, and before the treasurer is warranted to make collection.
>
> "In McMillen v. Anderson, 95 U. S., 37, it was held, that a statute which gives a person against whom taxes are assessed a right to enjoin their collection, and have their validity judicially determined, is due process of law."

In addition to other penalties and forfeitures, Section 156 of the act provides for a fine of from twenty-five to one thousand dollars for each offense wherever anyone violates any provision of a law which the Tax Commission is required to administer, or neglects or refuses to perform any duty therein required for which a penalty has not been otherwise provided, or neglects or refuses to obey any lawful requirement or order made by such commission.

It will be claimed, doubtless, that even though these coercive provisions and restrictions upon remedial rights may be unconstitutional, their invalidity will not render the tax itself unconstitutional, and reliance will be placed upon those terms in the act which provide that the sections shall be treated separately and that the invalidity of one shall not affect the others. Nevertheless, the court must look at the act as a whole, and if it appears that it was the intention of the legislature to clothe the tax commission and the other officials involved with an absolute power not to be interfered with in any event by the courts, and that it cannot be said that the taxing provisions would have been enacted except as a part of this scheme, then we feel that the court would not be justified in making a separation, and would have no alternative but to hold such taxing provisions void. In any event, the invalidity of the sections now under consideration would warrant and require the granting of the temporary injunctions for which the plaintiffs are now asking, in the event that their bills are held to state causes of action. This would follow, because only by such temporary injunction can they receive the protection to which they are entitled, pending the final determination of the issues that may be made.

## CONCLUSION.

We are, of course, aware that the presumption is in favor of the validity of the tax law, and that a rather wide variety of excise taxes have been sustained by this court. On the other hand, where there is a clear violation of the State or Federal Constitution, or both, this court has never hesitated to grant relief.

We claim that, under our several assignments of error, the District Court was wrong when it refused to grant appellants the temporary injunctions they were seeking.

We maintain that either the tax law, as a whole, is invalid, or, if not so, nevertheless appellants are entitled to relief because, under the admitted facts, the tax, as to them, exceeds the value of the privilege taxed, which, under the Ohio Constitution, as construed by the Ohio Supreme Court, is not permissible where a tax on a privilege, as such, is concerned.

Respectfully submitted,

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# INDEX.


STATEMENT OF CASE. 1-6

Necessity of examining into entire system of taxation of the state applicable to railroad companies in order to determine the validity and effect of the tax involved in the cases at bar.....4, 5

Galveston, Harrisburg & San Antonio Railroad Company vs. Texas, 210 U. S., 217, 226..... 5

Maine v. Grand Trunk Ry. Co., 142 U. S., 217.... 5

United States Express Co. v. Minn., 223 U. S., 323 ..... 5

The federal and the equity jurisdiction conceded.. 6

ARGUMENT.

A. THE CONTENTION THAT UNDER THE CONSTITUTION OF OHIO, AS CONSTRUED BY THE OHIO SUPREME COURT, THE LEGISLATURE IS WITHOUT POWER TO IMPOSE ANY PRIVILEGE TAX WHICH IS IN EXCESS OF THE VALUE OF THE PRIVILEGE TAXED, AND THAT INASMUCH AS THE ADMITTED FACTS SHOW, IT IS ALLEGED, THE PRESENT TAX UPON APPELLANTS TO WHOLLY EXCEED SUCH VALUE, ITS EXACTION AS TO THEM VIOLATES THE STATE CONSTITUTION AND AMOUNTS TO CONFISCATION AND THE TAKING OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.....7-106

Southern Gum Co. v. Laylin, 66 O. S., 578..... 7
*Analysis of the decision in Southern Gum Company vs. Laylin, 66 O. S., 578*.....8-27
Adler v. Whitbeck, 44 O. S., 539..... 19
Ashley v. Ryan, 49 O. S., 504; 153 U. S., 436..... 12
Express Company v. State, 55 O. S., 69..... 16
Hagerty v. State, 55 O. S., 613..... 14
Ohio River & Western Ry. Co. v. Dittey, 203 Fed., 537 ..... 14
Southern Gum Co. v. Laylin, 66 O. S., 578 .....8, 10, 18, 20, 27
State ex rel. v. Ferris, 53 O. S., 314..... 14
Telegraph Company v. Mayer, 28 O. S., 521..... 14
*The nature of the privilege taxed by the law involved in Southern Gum Company vs. Lawlin; being the privilge of corporate existence, as distinguished from the privilege of doing business as a corporation; and the tax being one on the franchise as distinguished from an excise occupation tax*.....27-28
Cooley on Taxation, 3rd Ed. Vol. 1, pp. 31, 37.. 28
Flint v. Stone-Tracy Co., 220 U. S. 107..... 28
Southern Gum Co. v. Laylin, 66 O. S. 578..... 27
*The nature of the privilege taxed by the law involved in the cases at bar. The privilege, being described but not defined in the statute, may be resolved into at least three elements, viz*.....28-68
*1. The element of natural monopoly, which is common to all the utilities taxed, and constitutes them such*.....39-44
Cincinnati Gas Light & Coke Co. v. State, 18 O. S. 238, 243 ..... 43
Munn v. Illinois, 92 U. S. 113, 126..... 40

Wyman on Public Service Corporations, Volume 1, Section 1 ..... 42
Wyman on Public Service Corporations, Volume 1, Section 50 ..... 41
Wyman on Public Service Corporations, Volume 1, Section 90 ..... 41
Zanesville vs. Gas Light Co., 47 O. S. 1, 33..... 43
*2. The burdens imposed upon the state and the public by the conduct of the business taxed*.....44-51
Adler v. Whitbeck, 44 O. S. 539..... 45
Express Company v. Minnesota, 223 U. S. 335.... 50
Galveston, Harrisonburg & San Antonio Ry. Co. v. Texas, 210 U. S. 217..... 50
Ohio River & Western Ry. Co. v. Dittey, 203 Fed. 537 .....45-47
Southern Gum Co. v. Laylin, 66 O. S. 578..... 44
*3. As to corporate public utilities, the corporate franchise itself.* .....51-68
Adams Express Co. v. Ohio State Auditor, (rehearing) 166 U. S. 185, 223..... 64
Express Co. vc. Minnesota, 223 U. S. 335.....
Galveston Harrisonburg & San Antonio Ry. Co. v. Texas, 210 U. S. 217..... 59
People ex rel. v. Williams, 200 N. Y. 93..... 65
Southern Gum Co. v. Laylin, 66 O. S. 578..... 54
State v. C. & P. Ry. Co., 13 O. N. P. n. s. 671..... 62
State of Ohio v. Ohio Traction Co., Appendix "C" of this brief..... 60
State ex rel. v. Taylor, 55 O. S. 61..... 63
State tax on Railway Gross Receipts, 15 Wall. 284. 66

*The so-called "value limitation" referred to in Southern Gum Company v. Laylin, 66 O. S. 578, was not intended to be and cannot be applied to the taxation of the privilege reached by the law involved in the cases at bar* ..... 68-74

Adler v. Whitbeck, 44 O. S., 539 ..... 69, 73

Southern Gum Co. v. Laylin, 66 O. S. 578 ..... 69, 70, 73, 74

*Even if the said "value limitation" could be applied generally to the imposition of the tax involved in the cases at bar, it cannot be invoked by an individual taxpayer to relieve him from the burden of the tax on a showing that his business is unprofitable.* ..... 74-96

Ashley v. Ryan, 49 O. S. 504, 525, 526 ..... 76, 79

Baker v. Cincinnati, 11 O. S. 549 ..... 82

Cincinnati Gas Light & Coke Co. v. State, 18 O. S. 238 ..... 76

Cooley's Constitutional Limitations, 6th Ed. 587 .. 85

Cooley's Constitutional Limitations, 588 ..... 85

Cooley's Constitutional Limitations, 598, 606, 607. 85

Cooley's Constitutional Limitations, 608, 611, 613 ..... 86, 87

Cooley on Taxation, 3rd Ed. Vol. 1, 3 ..... 88

Cooley on Taxation, 3rd Ed. Vol. 1, 9 ..... 88

Cooley on Taxation, 3rd Ed. Vol. 1, 31 ..... 88

Cooley on Taxation, 3rd Ed. Vol. 1, 84, 181, 192 225, 254 ..... 85

Cooley on Taxation, 3rd Ed. Vol. 1, 390, 391 ..... 75

Cooley on Taxation, 3rd Ed. Vol 1, 684 ..... 94

Cooley on Taxation, 3rd Ed. Vol. 2, 1153 ..... 90

Flint v. Stone-Tracy Co., 220 U. S. 108, 151 ....82, 91

Lander v. Burke, 65 O. S. 532, 542..... 82
Lewis v. State, 69 O. S. 479..... 82
Loan Association v. Topeka, 20 Wall. 655, 664....
McCulloch v. Maryland, 4 Wheat, 316, 428.....
McNeil v. Hagerty, 51 O. S., 255, 265..... 82
Monnet vs. State, 45 O. S., 69..... 76
Missouri Rate Cases, 230 U. S. 474, 508..... 83
Muller v. Oregon, 208 U. S. 412..... 77
Northern Pacific Railroad Co. v. North Dakota, 216 U. S. 579 ..... 83
Ohio River & Western Ry. Co. v. Dittey, 203 Fed. 537 ..... 82
Shotwell v. Moore, 45 O. S. 646..... 82
Southern Gum Co. v. Laylin, 66 O. S. 578...78, 79, 80
State ex rel. v. Ferris, 53 O. S., 314, 326..... 76
State vs. Guilbert, 70 O. S., 253..... 82
State Railroad Tax Cases, 92 U. S., 575....82, 83, 91
Wilcox vs. Consolidated Gas Co, 212 U. S. 19..... 83
*Excise taxation in the pure sense distinguished from taxation of franchises as such* .....96-102
Century Dictionary ..... 98
Flint v. Stone-Tracy Co., 220 U. S. 108, 151....97, 101
Missouri Rate Cases, 230 U. S. 474, 508.....100
Thomas v. United States, 192 U. S. 372..... 98
*The federal question sought to be raised by appellants depends upon their interpretation of Southern Gum Company v. Laylin, 66 O. S. 578; they do not and cannot claim under the Fourteenth Amendment to the Federal Constitution, independently of that decision*.....102-106
Cooley on Taxation, 3rd Ed. Vol. 1, 55 et seq.....105
Kelly v. Pittsburg, 104 U. S. 78.....105

McCray v. United States, 195 U. S. 27.....104
Southern Gum Co. v. Laylin, 66 O. S. 578....102, 104
B. EQUAL PROTECTION OF THE LAWS OF OHIO IS NOT DENIED BY THE LEGISLATION INVOLVED IN THE CASES AT BAR BECAUSE OF ITS ALLEGED FAILURE TO APPLY TO ALL "PUBLIC UTILITIES."....106-119
American Sugar Refining Company v. Louisiana, 179 U. S. 89.....111
Armour Packing Co. v. Lacy, 200 U. S. 226.....111
Bell's Gap Railroad Co. v. Pa., 134 U. S. 232..109, 113
Brown-Foreman Co. v. Kentucky, 217 U. S. 563...112
Connolly v. Union Sewer Pipe Co., 184 U. S. 540.110
Home Insurance Co. v. N. Y., 134 U. S. 594.....110
Kentucky Railroad Tax Cases, 116 U. S. 321.....107
Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283.....111
Munn v. Illinois, 94 U. S. 113.....106
Southwestern Oil Co. v. Texas, 217 U. S. 114.....111
State ex rel. v. Ferris, 53 O. S. 314, 341.....119
W. W. Cargill Co. v. Minn., 180 U. S. 452.....111
C. THE OHIO LAW DOES NOT DENY THE EQUAL PROTECTION OF THE LAWS OF THE STATE BECAUSE OF THE DIFFERENCES IN THE RATES IMPOSED BY IT UPON DIFFERENT PUBLIC UTILITIES.....120-132
Kidd v. Alabama, 188 U. S. 730.....132
Pacific Express Co. v. Seibert, 142 U. S. 339.....124
Railroad Co. v. Poland, 10 O. N. P. n. s. 617....129
Savannah, T. & I. of H. Ry. v. Savannah, 198 U. S. 392.....129
(The authorities cited under 'B,' *supra*, are also relied upon in support of this proposition.)....120

D. THE ACT DOES NOT DENY THE EQUAL PROTECTION OF THE LAWS OF OHIO BECAUSE OF ITS FAILURE TO CLASSIFY RAILROADS FOR EXCISE TAX PURPOSES ACCORDING TO ANY ALLEGED NOTORIOUS DIFFERENCES AMONG THEM.....132-137
Blackstone v. Miller, 188 U. S. 189.....133
Cooley on Taxation, 3rd Ed. Vol. 1, 390, 391.....136
Muller v. Oregon, 208 U. S. 412.....136
E. THE READJUSTMENT OF RATES OF EXCISE TAXATION MADE BY THE OHIO LEGISLATURE FOLLOWING THE DECISION IN GALVESTON, HARRISBURG AND SAN ANTONIO RAILROAD COMPANY V. TEXAS, 210 U. S. 217, DOES NOT DISCLOSE AN INTENTION INDIRECTLY TO BURDEN OR TO CONTINUE TO BURDEN INTERSTATE COMMERCE AS SUCH.....137-148
Cooley on Taxation, 3rd Ed. Vol. 1, 41.....141
Cooley on Taxation, 3rd Ed. Vol. 1, 411.....141
Galveston, Harrisonburg & San Antonio R. R. Co. v. Texas, 210 U. S. 217.....139
People v. Brooklyn, 4 N. Y., 419, 426, 427.....142
Ratterman v. Telegraph Co., 127 U. S. 411.....139
F. THE TAX IMPOSED BY THE OHIO LAW IS NOT IN EFFECT AN ADDITIONAL TAX UPON PROPERTY. .....148-149
Adler v. Whitbeck, 44 O. S. 539..... 148
Anderson v. Brewster, 44 O. S. 576.....148
Ashley v. Ryan, 49 O. S. 504.....148
Express Co. v. State, 55 O. S. 69.....148
Flint v. Stone-Tracy Co., 220 U. S. 107.....148
Southern Gum Co. v. Laylin, 66 O. S. 578.....148
State ex rel. v. Ferris, 53 O. S. 314.....148
Telegraph Company v. Mayer, 28 O. S. 521.....148

G. FOREIGN COMMERCE IS NOT BURDENED BY THE ACT. .....149-151

Ratterman v. Western Union Telegraph Co., 127 U. S. 424, 425.....151

H. THE ALLEGED COERCIVE SECTIONS OF THE OHIO LAW PROPERLY INTERPRETED VIOLATE NO CONSTITUTIONAL LIMITATION; BUT EVEN IF REGARDED AS UNCONSTITUTIONAL, THEIR INVALIDITY DOES NOT AFFECT THE SUBSTANTIVE PROVISIONS OF THE ACT; NOR CAN THEIR VALIDITY BE QUESTIONED IN THESE CASES. .....151-156

Flint v. Stone-Tracy Co., 200 U. S. 177.....154

Minnesota Rate Cases, (Decided June 9th, 1913)...153

Ohio River & Western Railroad Co. v. Dittey, 203 Fed. 537 .....154, 156

Wilcox v. Consolidated Gas Co., 212 U. S. 53, 54..154

Young, ex parte, 209 U. S. 123.....153

APPENDIX "A."

Laws of Ohio now in force relating to the taxation of railroads and other public utilities, as well with respect to property as with respect to franchises and privileges; showing also the general scope and effect of the act of May 31, 1911.

APPENDIX "B."

Abstract of certain former acts of Ohio showing legislative history of that state respecting franchise and excise taxation.

APPENDIX "C."

Decisions of Common Pleas Court and Court of Appeals of Franklin County, Ohio, in State vs. Ohio Traction Company.

# Supreme Court of the United States

OCTOBER TERM, 1913.

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THE OHIO RIVER AND WESTERN RAILWAY COMPANY, A CORPORATION,

APPELLANT,

vs.

ROBERT M. DITTEY, FRANK E. MUNN AND CHRISTIAN PABST, AS THE TAX COMMISSION OF OHIO, AND THE TAX COMMISSION OF OHIO,

APPELLEES,

[No. 642.]

And

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, A CORPORATION,

APPELLANT,

vs.

DAVID S. CREAMER, TREASURER OF STATE OF THE STATE OF OHIO; EDWARD M. FULLINGTON, AUDITOR OF STATE OF THE STATE OF OHIO; TIMOTHY S. HOGAN, ATTORNEY GENERAL OF THE STATE OF OHIO; ROBERT M. DITTEY, FRANK E. MUNN AND CHRISTIAN PABST, AS THE TAX COMMISSION OF OHIO, AND THE TAX COMMISSION OF OHIO,

APPELLEES.

[No. 643.]

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## BRIEF FOR APPELLEES.

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### INTRODUCTORY STATEMENT.

The duty of stating the facts of the cases at bar, and the assignment of errors complained of has been well discharged by counsel for the appellants in the opening brief.

But we find it necessary to make an opening statement because that of appellants, on pages 4, 5 and 6, of their brief characterizes certain Ohio legislation in a very general way without quoting extensively from the statute to which it refers. Other quotations from this act are found in other parts of the brief; but neither the act as a whole nor, in our view, enough thereof to enable the court to formulate a decision of these cases, is found anywhere in the brief. Furthermore, on page 68 of appellant's brief, is found a reference to certain acts of the Ohio legislature which were forerunners of legislation involved in the cases at bar. This earlier legislation is not even cited, much less quoted.

We deem the consideration by this court of much of the latest enactment of the Ohio legislature which has not been printed in the opening brief necessary to the court's decision of these cases. We have measured the extent of the court's consideration of the Ohio statute necessary to the decision of these cases by a rule which we understand has been uniformly followed by this court, to the effect that upon questions of classification arising under the Fourteenth Amendment to the Constitution of the United States, and under the interstate commerce clause thereof, the court will not consider isolated acts or sections or parts of acts without giving heed to the effect of other parts of the same act or other similar acts of the state. That is to say, the question being as to whether or not a particular tax is discriminatory, or attempts to place a burden upon interstate commerce, or is an excise tax as distinguished from a property tax—in short, upon any and all questions going to the nature and validity of a particular tax of a state,—regard must be had to the

*whole system* of taxation of which a particular act or section is but a part.

This principle was clearly announced by Mr. Justice Holmes in delivering the opinion of this court in Galveston, Harrisburg & San Antonio R. R. Co. v. Texas, 210 U. S. 217-226. In the course of the opinion, the Justice was distinguishing the case then at bar from the earlier case of Maine v. Grand Trunk Ry. Co., 142 U. S. 217, and speaking of that decision he says, at the page above cited:

> "This seems at first sight like a reaction from the Philadelphia & Southern Mail Steamship Company case (122 U. S. 326). But it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the state was to reach that value and not to fasten on the receipts from transportation as such was shown by the fact that *the scheme of the statute was to establish a system.* * * * The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax * * *"

Again, on page 227 of the same opinion, it is said that:

> "A practical line can be drawn by taking *the whole scheme of taxation into account.* That must be done by this court as best it can * * *"

The same principle has been more lately applied by this court in cases like United States Express Co. v. Minn., 223 U. S. 325.

In order to place before the court in connected form so much of the statutes of the State of Ohio, now in force, which exact taxes from the appellants in the cases at bar, as under the rule just stated seems to us to be necessary,

we have formulated a somewhat extensive collection of sections of the Ohio law which will be found in "Appendix A" of this brief. In further explanation of the contents of "Appendix A," we may say that practically all of the sections therein quoted are parts of a single legislative enactment, being the act referred to on page 4 of appellant's brief as the act of May 31, 1911, 102 O. L. 224.

Appellants question the constitutionality of the present Ohio legislation upon the basis of the changes in the pre-existing law effected thereby. As we also desire to refer to the history of Ohio legislation of this character leading up to the final enactment of the act of May 31, 1911, we have formulated in "Appendix B" of this brief a short outline of that legislative history, with such quotations from the former acts as have seemed to us necessary for the court's purpose.

Also by way of preliminary statement, we may say that we concede the Federal jurisdiction of these cases and the equity jurisdiction as well. We do not concede that what are characterized, on page 7 of appellant's brief as the "coercive features" of the act, properly interpreted, warrant injunctive relief on the averments of the bills, nor do we concede that there is any showing whatever of threatened irreparable injury. However, the mere fact that the act specifically makes the tax a lien upon the real estate of appellants, is deemed by us sufficient ground for equity jurisdiction.

## ARGUMENT.

A. THE CONTENTION THAT UNDER THE CONSTITUTION OF OHIO, AS CONSTRUED BY THE OHIO SUPREME COURT, THE LEGISLATURE IS WITHOUT POWER TO IMPOSE ANY PRIVILEGE TAX WHICH IS IN EXCESS OF THE VALUE OF THE PRIVILEGE TAXED, AND THAT INASMUCH AS THE ADMITTED FACTS SHOW, IT IS ALLEGED, THE PRESENT TAX UPON APPELLANTS TO WHOLLY EXCEED SUCH VALUE, ITS EXACTION AS TO THEM VIOLATES THE STATE CONSTITUTION AND AMOUNTS TO CONFISCATION AND THE TAKING OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

With a view to the most orderly presentation of the various points made by appellants, we have chosen to follow the outline of their argument. The above language is substantially that of appellant's counsel, in stating their first subject of discussion, at page 14 of the opening brief.

The proposition thus advanced cannot be well considered or discussed unless it be resolved into certain subsidiary propositions.

The court will note that the whole argument of counsel upon the general proposition is founded upon their interpretation of the decision of the Ohio Supreme Court in Southern Gum. Co. v. Laylin, 66 O. S. 578.

*Analysis of the Decision in Southern Gum Company v. Laylin, 66 O. S. 578.*

This case was instituted for the obvious and indeed avowed intention of determining the constitutionality of an Ohio act passed April 11, 1902, and known as the "Willis Law." We quote so much of that law as may illustrate its nature to this court.

Section 1. Every corporation organized under the laws of this state, for profit, shall make a report in writing to the secretary of state, annually, during the month of May, in such form as the secretary of state may prescribe, containing the following facts:

(Here follows a statement of certain facts relating to the organization of the corporation, its authorized subscribed or issued and outstanding capital stock, the names of its officers and directors, etc.)

Upon the filing of such report the secretary of state shall charge and collect from such corporation a fee the month of May, in such form as the secretary of issued and outstanding capital stock of said corporation, to be not less than ten dollars in any case.

Section 2. Every foreign corporation, now or hereafter doing business in this state, and owning or using a part of all of its capital or plant in this state, and subject to compliance with the provisions of Section 148c of the Revised Statutes of Ohio, shall * * * make a report in writing to the secretary of state annually during the month of September, in such form as the secretary of state may prescribe, containing the following facts:

(Here follows a statement of facts relating to the method in which the company does business in Ohio, the value of the property by it owned within and without the state respectively, etc.)

Upon the filing of such report the secretary of state, from the facts thus reported and any other facts coming to his knowledge bearing upon the question, shall

> determine the proportion of the authorized capital stock of the company represented by its property and business in Ohio, and shall charge and collect from such company, in addition to the initial fees provided for in Sections 148c and 148d of the Revised Statutes of Ohio, for the privilege of exercising its franchises in Ohio, annually, one-tenth of one per cent. upon the proportion of the authorized capital stock of the corporation represented by property owned and used and business transacted in Ohio, and to be not less than ten dollars in any case."

Other features of this act of 1902 will occasion further comment in this brief, and the whole law is abstracted in "Appendix B" herein. The two sections just quoted, however, are sufficient, it is believed, for the purposes of the court in this connection.

The plaintiff in the action, a corporation organized under the laws of Ohio, averred that when it had been incorporated it had paid the required initial or incorporation fee to the secretary of state, and that since the date of its incorporation it had listed its property for property taxation, as required by the law of the state, and had paid all taxes due under such assessments. It alleged the unconstitutionality of the act of 1902 as to domestic corporations, on the ground that the fee provided for thereby was, in essence, a tax, and that, as such, it was not assessed by a uniform rule according to the true value of the property taxed in money, in violation of Article XII, Section 2, of the Constitution of the State of Ohio, which then provided that:

> "Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise; and also all real and personal property at its true value in money."

This claim resolved itself into a contention that the fee in question, as a tax, amounted virtually to a property tax and was, therefore, subject to the constitutional limitation.

In sustaining the act of 1902 the Supreme Court, in its opinion, per Burket, J., which is epitomized in the syllabus, brushed aside the mooted question as to whether the fee of which the so-called Willis Law spoke was a tax. The opinion opens with the court's conclusion on this point, as follows:—

> "The fee of one-tenth of one per cent. exacted from corporations in May of each year is an excise or franchise tax for general revenue. That such a tax may be constitutionally collected has been decided by this court in Telegraph Co. v. Mayer, 28 O. S. 521; Express Co. v. State, 55 Ohio St., 69; State ex rel. v. Ferris, 52 Ohio St. 314; and other cases, and is no longer an open question."

Passing then to the interpretation of Article XII, Section 2, of the Ohio Constitution, the opinion employs the following language: (p. 593)

> "The absolute and unlimited power of taxation is granted by that section to the general assembly, and the taxation may be upon franchises, privileges or property, as the general assembly may deem best; but when it comes to taxing property, there is a limitation placed upon that power by sections one, two and three of article twelve of the constitution, and by section four of article thirteen of the same instrument. * * * These are very important limitations upon the power of taxation *of property* granted by said section one of article two of the constitution, and are intended to secure uniformity and equality in taxation on property.
>
> "But upon the power to tax privileges and franchises there is no express limitation in the constitution, * * *"

What then follows in the opinion is what was, perhaps with propriety, characterized by the court below in the cases at bar as a "dictum," with the qualification that it cannot be safely treated as such, "for the reason that it is carried forward into the syllabus, which in Ohio states the law of the case." (Transcript of Record No. 643, page 24.)

That is to say, Judge Burket, and the court with him, having decided that the constitutional limitation relied upon by the plaintiff in the Southern Gum case did not restrict the legislative power of Ohio from enacting the act of 1902, proceeded then to discuss certain other constitutional limitations which had not been relied upon by the plaintiff therein, but which in the opinion of the court did restrict the legislature in the exercise of such taxing power as it might possess, aside from that limited by Article XII, Section 2, of the Constitution. Such limitations are those referred to in the second branch of the court-prepared syllabus, which is as follows:

> "* * * Such power is impliedly limited by those provisions of the Constitution which provide that private property shall ever be held inviolate, but subservient to the public welfare, that government is instituted for the equal protection and benefit of the people, and that the constitution is established to promote our common welfare."

Having defined the limitations, which in its opinion did restrain the General Assembly of Ohio in the exercise of such general taxing power, the Supreme Court of that state applied these limitations to the taxation of privileges and franchises in the language of the third branch of the syllabus, which is as follows:

> "By reason of these limitations a tax on privileges and franchises cannot exceed the reasonable value

of the privilege or franchise originally conferred, or its continued annual value thereafter. The determination of such values rests largely in the general assembly, but finally in the courts."

These two branches of the syllabus constitute a substantial paraphrase of the language of Judge Burket in that paragraph of his opinion which is quoted on page 18 of appellant's brief. It is interesting to note, however, that in explanation of what he means by the taxation of privileges and franchises, Judge Burket cites certain cases. Some question having arisen in the cases at bar as to the intention of the Ohio court in using this very language, we assume that an examination of the cases cited by the Ohio court in this connection may be helpful to this court.

Ashley v. Ryan, 49 O. S. 504, mentioned by Judge Burket as an example of "taxing a privilege or franchise originally conferred," is the same case as that decided by this court in 153 U. S. 436. It involved the constitutionality of Section 143a, Revised Statutes of Ohio, authorizing the secretary of state of that state to charge and collect a certain fee for the filing of articles of agreement of incorporation and consolidation. As stated by Judge Minshall, delivering the Ohio court's opinion in that case, "the first objection to the statute is that it imposes a tax not authorized by the constitution of the state."

First pointing out that it had already been well settled that Article XII, Section 2, of the Constitution of Ohio was not a complete limitation upon the taxing power of the general assembly of the state, Judge Minshall discusses the nature of the incorporation fee as follows (p. 524.):

"Whether the sum required by this statute for filing articles of incorporation be termed a fee, a tax or

an assessment, is, we think, immaterial, for it is clear that it is not a tax on property. The filing and record of such articles is simply an authority or license to the persons filing them to form a corporation, and the sum paid therefor is the consideration demanded and paid the state for the grant of the *right to be a corporation*. We fail to perceive anything in the principles of government or sound policy, that should forbid the state from making such an exaction even for the purposes of general revenue. The franchise is valuable to the incorporators, or, it is fair to assume, it would not be sought; and that the burdens of government are greatly increased by the formation of corporations, is daily seen in the business of the courts and the police establishment of the state."

The Ohio court in Ashley v. Ryan did not, it will be observed, directly hold that the incorporation fee was more than sufficient to pay the expenses incident to the incorporation as such, and thus, being productive of general revenue, was necessarily a tax; but in Southern Gum Company v. Laylin, this initial fee seems to have been regarded as such a tax. Furthermore, it was distinctly held to be an example of a kind of tax which is "limited to the reasonable value of the privilege or franchise conferred."

We pause here to point out that the so-called "tax" approved in Ashley v. Ryan, and again approved in the Southern Gum case itself, consisted of a fee computed upon the basis of the authorized capital stock of a newly formed company. (Ashley v. Ryan, supra.) Obviously, the "privilege" conferred was the right to be a corporation. Therefore, we may safely assume that the doctrine of the Southern Gum case, as to what counsel for appellants have called the "value limitation," would and did not preclude the state from measuring a tax upon the right to be a corporation, when originally conferred, by a certain

percentage of the authorized capital stock of the new corporation.

We may safely assume also, from the citation of the case of Ashley v. Ryan by Judge Burket in his opinion, that he had no thought of holding that a tax of the sort involved in that earlier decision would, under the constitutional limitations which he mentioned, have to be limited by any consideration of the profitable nature of the corporate franchise. In other words, the value of the franchise to be a corporation, while not the same in every case, is fairly measured by the authorized capital stock of the corporation and need not be measured by any appraisement of profit-producing ability.

For brevity's sake, we pass by the citations of State ex rel. v. Ferris, 53 O. S. 314, and Hagerty v. State, 55 O. S. 613, for the reason that both of these cases involve inheritance taxes, in which the measure of the tax was determined by the value of the property passing by inheritance. Accordingly, the decisions are not apt for our present purpose.

As "examples of taxing the continued value of the existing privilege or franchise from year to year" Judge Burket, in the Southern Gum case, cites, first, Telegraph Company v. Mayer, 28 O. S. 521. As to this decision we could add nothing to the comment of the court below. (Transcript No. 643, p. 24.)

> "The earlier case of Western Union Telegraph Co. v. Mayer, 28 Ohio St. 521, is also instructive. A law of uniform operation, which imposed an excise tax at a rate equal to that on property, on the gross receipts of foreign express and telegraph companies doing business in Ohio and prohibited, under heavy penalties, any person from acting as agent of or transacting any business for any company that defaulted in the

payment of such tax, was alleged to be violative of both the state and federal constitution. The tax was a charge on the privilege of such corporations exercising their franchises and powers within the state until the tax, interest and penalties thereon were fully paid. It was computed on the gross receipts arising manifestly not only from distinctively intrastate business, but from business which began elsewhere and terminated within the state, or had its inception in the state and terminated beyond its limits. Thus reckoned the amount was 3.34% of such receipts, but if restricted as it should have been to the purely intrastate business, it equaled 31.2% of the total receipts from that source, or 93.6% of such receipts not absorbed by current expenses. It was charged that the tax was oppressive and unjust in its operation, but the tax was upheld, it being stated in the opinion regarding its provisions that—

"'They are the conditions upon which corporations named in the act are allowed to do business within the state. Whether this tax is warranted by a wise public policy, or whether it is too onerous, are questions for the legislature and not for the courts. The burden is the price paid for transacting their business within the state. Any regulations imposed on such corporations, not amounting to a regulation of commerce, nor a tax on the property of the corporation within the state, imposed as a compensation to be paid to the state for the privilege of doing business within its territory, is, we think, within the legislative power of the general assembly. The unbroken current of judicial authority is in support of such power in the state, and in our opinion public policy demands its exercise.'

"The court, it is true, was speaking of a law affecting foreign corporations only which could exercise none of their powers or franchises within the state, save through comity or under legislative consent, and which the court found might have been excluded from the state altogether, with which theory we have nothing to do. But it is also true that it recognized the power to raise the necessary funds to defray the legitimate expenses of government by modes other

than an ad valorem system of taxation on all property in the state and the legislative power to create domestic corporations and prescribe the terms upon which they, as well as foreign corporations, might exercise their franchises. The right to extend the tax to domestic corporations undoubtedly existed, as was later held in the Southern Gum case, but the legislature did not see fit to embrace such corporations within the law. It would therefore seem to follow that the language quoted is applicable to domestic as well as foreign corporations, and that a law which, being of uniform operation, although it levied a charge almost equal to the entire net and distinctively intrastate profits of an individual corporation of a given class, is not, on that account, repugnant to any constitutional provisions, state or federal."

Counsel for appellants object, on page 36 of their brief, to the conclusion of the District Court relative to the case of Telegraph Company vs. Mayer, on the ground, substantially, that "it eliminates the value limitation absolutely, however construed," and would accordingly run counter to the decision of the Southern Gum case. Counsel forget that Telegraph Company v. Mayer, supra, was *cited with approval* in the Southern Gum case; that the statute involved in the Telegraph Company case measured its tax by *gross receipts;* and that by reason of these facts it must necessarily follow that an excise tax upon a privilege granted by the state may be measured by gross receipts without taking into consideration the amount or existence of net receipts, and without doing violence to what the court had in mind in using, in the Southern Gum case, the language of the sentence or two upon which the appellants have so ingeniously construed their case.

The same observations might be made respecting the case of Express Company v. State, 55 O. S. 69. That, too,

was a privilege tax, expressly so characterized in the legislation imposing it, which, for the purposes of this court, will be found sufficiently quoted at pages 76 and 77 of the 55th Ohio State Report. The amount of the tax was computed by taking two per cent. of the ascertained gross receipts of the company for business done, just as in the case at bar the amount of the tax is ascertained by taking four per cent. of the gross intrastate earnings of the appellants. We submit that the citation of these two cases with approval, by the Supreme Court of Ohio in deciding the Southern Gum case, upon which appellants rely so strongly, in connection with the so-called "value limitation" therein referred to, effectually negatives any idea that the "value limitation" is one which can be relied upon by an individual subject of taxation, so that facts may be adduced by him tending to show that his particular business or privilege is unprofitable, and the tax thus defeated as to him. The contrary quite clearly appears, as the District Court has correctly decided.

It will be observed that the Ohio court in dealing with the excise tax involved in the cases of Telegraph Co. v. Mayer, and Express Co. v. State, supra, held that the subject of taxation in each case was the privilege of exercising corporate franchises within the state—that is, the privilege of being recognized as a corporation. It was something which the state might affirmatively confer by the issuance of a license or certificate; and it was something which the state might withhold. In short, the subject of taxation in these cases was a thing created by the state.

So also with the privileges indicated by the citation of the cases of Ashley v. Ryan; State ex rel. v. Ferris and

Hagerty v. State, supra. All these privileges owe their creation and existence to the laws of the state by way of affirmative action. To the taxation of such privileges, the court applied what counsel have termed the "value limitation." That is to say, its holding was that when the sovereign power of the state had created a privilege as such, the same power could not take it back again by taxation more than had thus been conferred upon those in whom the privilege had been vested.

All these things, we think, follow from the above quoted paragraphs of the syllabus in Southern Gum Co. v. Laylin, supra, and from the corresponding language of Judge Burket's opinion. These conclusions are made even clearer, however, by the language of another paragraph of the opinion found at page 595 thereof, which in part is as follows:

> "A domestic corporation is given life and continued existence by the state, and this life and existence with their accompanying powers constitute the franchise, and this franchise being valuable and given by the state, the state may impose a franchise tax thereon to the amount of the value thus conferred and continued, the same as in taxation by assessment the first bestows a special benefit upon the property, and then takes back by way of assessment a part or all it has thus conferred." (Citing Walsh v. Barron, 61 Ohio St. 15, a special assessment case.)

It seems to us clearly to follow that what the Ohio court had in mind in its choice of language in the second and third branches of the syllabus of the Southern Gum Co. v. Laylin case, was simply that when the state, by the imposition of a certain tax, is attempting to exact revenue from a privilege of its own *affirmative creation* as a subject of taxation, the revenue which it may thus exact may not

exceed the continuing annual value of the privilege which it has *itself* conferred. There is no intimation thus far in the opinion, however, that the principle is to apply to so-called "privileges" which exist through natural causes and not because of any affirmative action or acquiescence of the state; there is no intimation thus far that the principle applies to taxation which may be in part referable to the police power; there is no intimation that the continuing annual value of a privilege is subject to appraisement in each individual case, like property, nor that the ascertainment of value of which the court speaks must be made with reference to the profitable use, either actual or possible, of the state-created privilege, by those in whom it has been vested.

But neither the opinion of Judge Burket nor the court's conclusions of law expressed in the syllabus stop with what has already been quoted. We call attention now to the fourth subdivision of the syllabus, which is as follows:

> "An excise tax may *also* be imposed upon corporations to compensate the state for the additional burden caused by the aggregation of capital in an artificial body, and the exemption in part, at least, of the individuals composing such body from liability for its debts."

We have italicized the ward "also" as used in the syllabus. The same word is found in the opinion. We think this language clearly indicates that the court intended to distinguish excise taxation of the kind mentioned in this connection from the taxation of privileges and franchises conferred by the affirmative action or acquiescence of the state itself.

The citation of Adler v. Whitbeck, 44 O. S. 539, in this connection is significant. That case involved the constitu-

tionality of a tax on the business of trafficking in intoxicating liquors, assessed in bulk, that is by a gross amount upon each place where the business was conducted. Certainly such a method of assessment cannot stand under any such value limitation as is spoken of elsewhere in the opinion of Southern Gum Co. v. Laylin.

The real conclusion of the court is found in the fifth and sixth branches of the syllabus, which are as follows:

> 5. "A franchise tax may be imposed by the general assembly upon corporations, both domestic and foreign, doing business in this state."
>
> 6. "The tax of one-tenth of one per cent. on the subscribed or issued and outstanding capital stock of corporations as provided for in the act of April 11, 1902, entitled 'An act to require corporations to file annual reports with the secretary of state, and to pay annual fees therefor,' is a franchise tax, and not a tax on property. Said act is a valid constitutional law."

In connection with these branches of the syllabus, however, we quote the concluding paragraph of the opinion, which connects them with the previous paragraphs of the syllabus relative to the limitations upon the power to tax franchises and privileges.

> "The tax of one-tenth of one per cent. on the amount of the subscribed or issued and outstanding stock, is not unreasonable, and does not appear to be above the continuing value of the *franchise of corporations* from year to year, and is therefore within the clear power of such taxation by the general assembly."

We submit that this language discloses perfectly the manner in which the *court itself applied* the "value limitation" upon which counsel rely. Let this court observe that the Ohio court first laid down the constitutional lim-

itations applicable to the taxation of corporate franchises and privileges, holding that the state was limited, in taxing such privileges, to the continuing annual value thereof, so that the taking of more than this would be confiscation; then, considering the tax of one-tenth of one per cent. of the issued and outstanding capital stock, affirmatively held that this tax, in amount, "does not appear to be above the continuing value of the *franchise of corporations* from year to year."

Is it not clear that the Ohio court considered the "franchise of corporations," of which it speaks, as a thing possessing annual value, referable to the amount of issued and outstanding capital stock, *as to each and every corporation subject to the provisions of the law?* Is there any indication here that the court would embark upon an inquiry as to whether the continuing annual value of a single corporation's charter in a single year amounted to one-tenth of one per cent. of its issued and outstanding capital stock for the purpose of ascertaining whether or not the tax should be applied to it; or whether or not the amount of the tax, if found to exceed the value of the particular charter, would render the whole law inoperative or void for that year?

We think the answer to this question is obviously in the negative. In other words, we submit that the court did appraise, so to speak, the value of the corporate franchise, and held that it exceeded, as to all corporations, regardless of individual circumstances, a sum equal to one-tenth of one per cent. of the issued and outstanding capital of each.

Let us then, sum up what we think are the apparent conclusions of the court in the Southern Gum Co. v. Laylin case, as shown by the facts before it in that case, the lan-

guage employed by the court in the syllabus, and the discussion of principles and citation of authorities indulged in by Judge Burket in delivering the opinion. They appear to us to be as follows:

1. The general assembly of Ohio by reason of the grant to it of the legislative power of sovereignty possesses the general taxing power of the state, which is restrained by Article 12, Section 2, and similar provisions of the Constitution of Ohio, with respect only to the taxation of property.

2. The exercise of the taxing power in the exaction of contributions from privileges and franchises owing their existence to a grant of the sovereignty itself, is limited by certain constitutional provisions to taxing a sum not in excess of the value of the privilege thus conferred or its continuing annual value thereafter.

3. But (the question being as to the state's power to tax corporations as such) the state may *in addition to a franchise tax* levy an excise tax on the privilege of doing business as a corporation under what may perhaps be called the police power of the state; the subject of taxation, in such cases, being the burdens imposed upon the state and the public by reason of the aggregation of capital in the hands of those subject to limited liability. This ground of taxation is separate and apart from the state-created franchise as such, and the exercise of this power is not necessarily subject to the value limitations to which the exercise of the other is subject.

4. The tax exacted by the law in the cases before the court and measured by a certain proportion of the issued and outstanding capital stock of domestic corporations, was a tax on the state-created franchise, and as such subject to the value limitation.

5. The amount of the tax imposed by the law before the court was considered, in connection with the value limitations imposed by the court's opinion, and was found not to violate that limitation. The consideration thus given was with a view to the effect of the tax upon corporations generally and not with a view to its effect upon any individual corporation.

Before we leave our analysis of the opinion, permit us to quote one provision of the act of 1902, which has not heretofore been mentioned, and which makes it absolutely clear that the court's method of applying the value limitation was that which we have described. We refer to the last provision of Section 8 of that law, found in 95 O. L. p. 128, which is as follows:

> "The mere retirement from business or voluntary dissolution of a domestic or foreign corporation without having filed the certificate (of retirement or dissolution) provided for in this section shall not exempt it from the requirement to make reports and pay fees in accordance with the provisions of this act."

That is to say, so long as the corporate franchise itself were in existence *it would be taxed* notwithstanding the corporation might have abandoned its use because of having found it impossible, by the exercise of due care, to produce dividends on its stock.

This section was a part of the law to which the Ohio court applied its self-created "value limitation." The fact that it was in the law proves conclusively to our minds, at least, that the court had no thought of laying down a principle by which any corporation might escape the franchise tax by showing that the privilege of being a corporation was of no profitable use to it, so long as it retained the privilege itself.

Perhaps it may be of value to this court for us to present what may be termed a negative analysis of the Southern Gum Co. v. Laylin case, by pointing out a few principles which were *not* decided or laid down by the Ohio court in that case, either inferentially or otherwise. We state the same as follows:

1. It was not decided that the "value limitation," as it was called by counsel for appellants, could be invoked by an individual subject of taxation to secure his or its escape from the tax, others remaining subject thereto. The decision is silent on the point, but the inference, for reasons already pointed out, is to the contrary of the proposition just mentioned.

2. It was not decided that the Ohio court, in applying the value limitation, where it is applicable, would measure the validity of a whole law by the effect of the tax upon a single individual case. The decision is silent on the point, but every inference found therein supports our negative statement.

3. It was not decided in the Southern Gum. Co. v. Laylin case that the so-called "value limitation" of which the court speaks applied to all excise taxation; but only to the taxation of privileges and franchises created by the state itself. This negation is rather clear from the face of the decision. Stated in another way, it is that the constitutional limitations of which the Ohio court speaks were not held in Southern Gum. Co. v. Laylin to restrain the power to impose an excise tax generally nor even to restrain the power to impose such a tax upon a so-called "privilege" when the "privilege" is not the creature of the state law—something which the state has given and more than which the state can not take away.

We have gone so carefully into the decision in the Southern Gum Company case, and have tried to treat it so exhaustively because of what seems to us to be the manifestly erroneous view of the effect of that decision which has been taken by counsel for the appellants. They discuss this subject at considerable length (pages 16 to 31 of their brief).

They premise their argument upon the averments of the respective bills in the cases at bar which are to the general effect that notwithstanding prudent investment and careful and economical management the two appellant railroads are not able to earn a fair return upon their respective investments, and one of them indeed is unable to earn any return at all, and is being operated at a loss. They then use their interpretation of the Southern Gum Company decision as a minor premise, it being as follows: The value limitation as laid down in Southern Gum Co. v. Laylin is to be applied to the taxes upon appellants, which are privilege taxes of the same kind or class as those held to be subject to this limitation in that decision, at least with respect to the application of the limitation; and it is to be assumed that the state is taxing something which it has conferred upon the appellants by some affirmative action, which thing cannot be of any value whatever because of the facts pleaded in the bill. Their conclusion from these premises is that, at least as to the appellants, if not throughout the entire field of its operation, the excise tax on the so-called privilege of carrying on the intrastate business of railroads is void, and its collection should be enjoined.

We think we have fairly epitomized appellant's position, which is nowhere stated in succinct form by them, but which we have endeavored to reduce to this position.

We submit that the interpretation put by appellants' counsel upon the Southern Gum Company decision is erroneous in the following particulars:

1. It assumes that the "privilege" upon which the railroad excise tax involved in the cases at bar is levied is such a privilege as is subject to the so-called "value limitation" of the Southern Gum Company decision.

2. It assumes that if the privilege upon which appellants are taxed by the law in question here is subject to any such limitation the value of the privilege which they severally possess is to be determined by the profit which these railroads by prudent investment and careful management are able to reap from its use. This, as we shall hereinafter point out, is tantamonut to a contention that an occupation tax or a privilege tax of any kind or character can, in the light of the decision in the Southern Gum Company case, be measured only by net income or earnings and never by gross income or earnings.

3. It assumes that if the so-called privilege which constitutes the subject of the railroad excise tax, may be taxed only under the limitations of value laid down by the Southern Gum Company case, these limitations are to be applied in individual cases, so as to excuse from the tax those individuals which can show that as to them the exaction exceeds the value of the privilege.

The District Court considered the Southern Gum Company decision in the light of the other decisions of the Supreme Court of Ohio very carefully, and its discussion thereof in the opinion below, which is printed on pages 23 to 29 of the transcript of the record, is quite exhaustive, so much so, indeed, that we feel that in a measure we presume when we undertake to discuss that decision in our

own way. We feel that there is no impropriety, at least, in calling to this court's attention a fact which may be of some interest in this connection, viz: That the distinguished circuit judge who participated in the decision of the District Court was of counsel for the secretary of state of Ohio in the case of Southern Gum Co. v. Laylin. Unfamiliarity with that decision is not to be imputed to him, and his interpretation of it, is, on this account, entitled to unusual weight.

*The Nature of the Privilege Taxed by the Law Involved in Southern Gum Co. v. Laylin.*

The foregoing analysis of the decision in Southern Gum Co. v. Laylin has, we apprehend, disclosed to the court the exact nature of the privilege taxed by the law involved in that case. As there is no dispute between opposing counsel respecting this point, we may content ourselves with a mere statement thereof as follows:

The privilege taxed by the "Willis Law" of 1902, considered and held valid by the Supreme Court of Ohio in Southern Gum. Co. v. Laylin, was the privilege of corporate existence—the franchise to be a corporation. This was the only thing which was the subject of the tax. It was a thing created by the sovereign power of the state itself, and hence, one as to which the value limitation might be applied by holding that the state was without power to retake more value than it had conferred under the guise of taxing the thing itself.

In this connection, however, we may again indulge in negative statement for the purpose of eliminating confusing issues. The privilege taxed by the law involved

in the Southern Gum Co. v. Laylin was not the privilege of doing business as a corporation, such as constitutes the subject of taxation under the federal income tax law, passed upon by this court in Flint v. Stone-Tracy Co., 220 U. S. 107. The definition of that privilege may be quoted from Mr. Justice Day's opinion at page 151, as follows:

> "The tax under consideration * * * may be described as an excise upon the particular privilege of *doing business* in a corporate capacity, i. e., that of advantages which arise from corporate or quasi organization."

Certainly the federal tax is to be distinguished from the state tax involved in Southern Gum Co. v. Laylin on the single ground that Ohio under the latter was exacting revenue from its own creature—the corporate franchise—while under the former congress was laying and collecting an excise tax upon a thing which the federal government had not created.

Again, the privilege taxed by the law, was not a mere occupation or pursuit. Such taxes are clearly distinguished from taxes on corporate franchises by Cooley on Taxation at pages 31 and 37, respectively, Vol. 1, Third Ed.

*The Nature of the Privileges Taxed by the Law Involved in the Cases at Bar.*

Surely, the application or non-application of the doctrines of the Southern Gum Co. v. Laylin case to the cases at bar cannot be determined without at least comparing the subjects of taxation under the two laws respectively. We have seen what was the declared subject of the tax imposed by the "Willis Law" of 1902. We

come now to consider what is the real subject of the tax in the cases at bar.

The privilege itself is referred to by one of the sections of the law in the following terms:

> "Sec. 95, 102 O. L. 224; General Code of Ohio, Section 5484. In the month of November the auditor of state shall charge for collection from each railroad company, a sum in the nature of an excise tax, *for the privilege or carrying on its intrastate business*, to be computed on the amount so fixed * * * as the gross earnings of such company on its intrastate business for the year covered by its annual report * * * by taking four per cent. of all such gross earnings, which tax shall not be less than ten dollars in any case."

The reference in this statute to "the privilege of carrying on its intrastate business" does not, we submit, constitute a *definition* of the subject of taxation; it is merely a *description* thereof. The lack of statutory definition, as distinguished from statutory description, must, we think, necessarily appear. Counsel for appellants, in making their ingenious application of the Southern Gum decision to the case at bar, have assumed or suggested perhaps more than one definition of the elements comprised within this privilege. Thus, at page 20 of their brief, they employ the following language:

> "There is an obvious distinction between the value of a business and the value of the privilege of engaging in that business. * * * It is idle to claim that a business which is conducted at a loss is a valuable business, and much the less that the privilege of engaging in it possesses any value."

At page 21 we find the following:

> "A business which, under prudent and economic management, will not earn enough to pay its neces-

sary expenses, and cannot be made to do so, possesses no value. * * *"

On the same pages the following language is used:

"The value of a business may be measured by the *net return* which it yields upon the investment. This is an absolute thing. The value of the privilege of carrying on that business, however, is necessarily a relative thing, and is measured by the excess, if any, which it yields upon the investment over and above what a readily available investment of the same capital would yield."

At pages 24 and 25 of their brief, counsel for appellants cite, as analogous, certain decisions relative to the law of damages for breach of contract of sale, to the general effect that where there is no difference between the contract price and the market price, the injured party is entitled merely to normal damages. The rule derived from these decisions is applied, at page 26 of the brief, as follows:

"Let us suppose that the state * * * had offered to plaintiff, in consideration of the payment of tax, the privilege or opportunity of carrying on or continuing a particular business. We will assume that the state breaks its contract * * * and that it is subject to respond therefor in damages, like an individual. The measure of damages will, of course, be the value of the thing which the state should have granted and which it failed to grant. * * * If the amount of the investment were known and the return upon that investment, which the wrongfully denied privilege would have brought, were known, and it were also known that other investments of the same capital were available to the plaintiff, which would bring it a better rate of return, then, we submit that in any event plaintiff could recover from the state no more than nominal damages."

Again, at page 27, we find the following:

> "It must not be forgotten that the plaintiffs are not attacking the value of an untried privilege. Had these suits been brought at the time the plaintiffs began business * * * the court might have had some excuse for saying that the plaintiffs should try it out and determine from experience what, if any, value the privilege would possess. * * * (citing certain rate cases) No such claim can now be made against the plaintiffs. The privilege has been tried and has been found wanting in value. The plaintiffs, indisputably, would be better off with their capital uninvested than they are in the exercise of the privilege taxed. They are, in fact, giving to the state more than they are receiving. They are respectively devoting to the business * * * an investment * * * which they could more profitably place in high class securities. * * *"

On pages 28 and 29 counsel cite the leading cases involving special assessments for public improvements, some of which, as we have already observed, are cited in Southern Gum Company v. Laylin. The rule laid down by these decisions is applied by counsel, as follows (page 30):

> "Where the privilege taxed consists in the opportunity to carry on a particular business, i. e., the opportunity to devote one's property to a particular use, then it must follow that the value of the business will depend upon and vary with the net returns from that use. No other measure of value is or can be practicable. * * *
>
> If, then, the value of the business varies with and is measured by the profit on the investment * * * it necessarily follows that the value of the privilege or opportunity of carrying on that business must be determined by *its net earning power* * * * as compared with the rate of profit open to the investor, irrespective of the privilege. * * *

> To have a value, the privilege must confer or continue an earning power otherwise unpossessed or unavailable, for if it does not do so, then it confers nothing."

Again, after discussing the opinion of the District Court, in so far as the same relates to the application of the doctrine of the Laylin case to individual cases, counsel, at page 39 of their brief, use the following language:

> "The applicants in this connection are not seeking relief because as to them the tax is more burdensome than it may be upon some other utilities, but because they *are not exercising* a privilege possessing value; and hence the state is attempting to take from them something which *they do not possess*, namely: an increment of value growing out of the exercise of the specific privilege. This is not discrimination but confiscation."

In endeavoring to escape the consequences of the decision in State Railroad Tax Cases, 92 U. S., 575-606, cited by the District Court, counsel point out, at pages 40 and 41, that the Illinois law involved in that decision taxed the franchises of the railroads of that state as property. instead of as privileges; and on page 24 attempt to draw a distinction as follows:

> "There is a real distinction here. A franchise *treated as property* must be regarded as other property, and the individual who owns it can no more escape payment of taxes upon it by reason of his insolvency than can he escape the payment of taxes on his tangible property. The ownership is the controlling element. The distinction between taxes on property and taxes on franchises and privileges, as such is clearly stated in the Laylin case itself. * * *"

The foregoing quotations from the brief will suffice to indicate the theory of counsel as to the nature of the priv-

ilege upon which applicants are taxed by the law involved in the case at bar. Indeed, the bills themselves are perhaps sufficient for this purpose. We forbear to quote from the transcript of the record; but it will be observed upon an examination of the bills that the basic allegations in both cases are to the general effect that the plaintiffs have, in the exercise of due care and prudence, invested their capital respectively in certain railroads; that they have respectively exercised due care and economy in the management of these railroads; and that, notwithstanding these facts, the one railroad company is unable to reap upon its investment a return commensurate with that upon other investments at all times readily available in the money market; while the other railroad company is simply unable to reap any profits whatever, being operated at a loss.

Epitomizing all that is apparent from the bills themselves, and the above quoted excerpts from the brief, we may perhaps venture the following statement of counsel's definition of "the privilege of carrying on the intrastate business" of a railroad company as the subject of the tax involved in the case at bar:

The privilege of carrying on an intrastate railroad business as a subject of taxation consists of the state's grant or permission to an individual, partnership or corporation to devote means or capital to the operation of a railroad, with a view to the production of unusual net profits.

Stating it in another way, the theory seems to be that the imposition of an occupation or privilege tax upon the operation of a railroad is not justified in any individual case unless it appear that the operators of the railroad, who must pay tax, are able to produce for themselves a

margin of profit beyond what they would be able to produce if their capital were invested in a business not similarly taxed.

We dissent wholly from this theory. But before undertaking to state our own definition of what is comprised within what the statute designates as "the privilege of carrying on an intrastate railroad business" we deem it advisable to quote from and to analyze the statutes of the state; as well the one under which the tax in question is exacted from railroad companies as others imposing like taxes upon corporations and public utilities of other classes. The nature of the "privilege" which constitutes the subject of the tax may appear inferentially upon the face of the statutes themselves.

With this end in view, we call attention, first, to certain definitions embodied in the statute itself, quoting for that purpose the following sections of the law of 1911, which will be found substantially in full in "Appendix A" of this brief:

> Sec. 5415. (Sec. 39.) The term "public utility" as used in this act means and embraces each corporation, company, firm, individual and association, their lessees, trustees, or receivers elected or appointed by any authority whatsoever and herein referred to as express company, telephone company, telegraph company, sleeping car company, freight line company, equipment company, electric light company, gas company, natural gas company, pipe line company, waterworks company, messenger company, signal company, messenger or signal company, union depot company, water transportation company, heating company, cooling company, street railroad company, railroad company, suburban railroad company, and interurban railroad company, and such term "public utility" shall include any plant or property owned or operated, or both, by any such companies, corporations, firms, individuals or associations,

Section 5416. (Sec. 40.) That any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporations, wherever organized or incorporated:

When engaged in the business of conveying to, from, or through this state, or part thereof, money, packages, gold, silver, plate or other article, by express, not including the ordinary lines of transportation of merchandise and property in this state, is an express company;

When engaged in the business of transmitting to, from, through, or in this state, telephonic messages, is a telephone company;

When engaged in the business of transmitting to, from, through, or in this state, telegraphic messages, is a telegraph company;

When engaged in the business of operating cars for the transportation, accommodation, comfort, convenience, or safety of passengers, on or over any railway line or lines, in whole or in part within this state, such line or lines not being owned, leased or operated by such company, whether such cars be termed sleeping, palace, parlor, chair, dining or buffet cars, or by another name, is a sleeping car company;

When engaged in the business of operating cars for the transportation of freight, whether such freight is owned by such company, or any other person or company, over any railway line or lines, in whole or part within this state, such line or lines not being owned, leased or operated, by such company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture or refrigerator cars, or by another name, is a freight line company;

When engaged in the business of furnishing or leasing cars, of whatsoever kind or description, to be used the operation of any railway line or lines wholly or partly within this state, such line or lines not being owned, leased or operated, by such company, is an equipment company;

When engaged in the business of supplying electricity for light, heat or power purposes, to consum-

ers within this state, is an electric light company;

When engaged in the business of supplying artificial gas for lighting or heating purposes, to consumers within this state, is a gas company;

When engaged in the business of supplying natural gas for lighting, heating or power purposes, to consumers within this state, is a natural gas company;

When engaged in the business of transporting natural gas or oil through pipes or tubing, either wholly or partially within this state, is a pipe line company;

When engaged in the business of supplying water through pipes or tubing, or in a similar manner to consumers within this state, is a waterworks company;

When engaged in the business of supplying messengers for any purpose is a messenger company;

When engaged in the business of signaling or calling by electric apparatus, or in a similar manner, for any purpose is a signal company;

When engaged in the business of operating a union depot or station for railroad, suburban or interurban railroad purposes, is a union depot company;

When engaged in the transportation of passengers or property, by boat or other craft, over any water way, whether natural or artificial, from one point within this state to another point within this state or between points within this state and points without this state, is a water transportation company;

When engaged in the business of supplying water, steam or air through pipes or tubing, to consumers within this state, for heating purposes, is a heating company;

When engaged in the business of supplying water, steam or air through pipes or tubing, to consumers within this state, for cooling purposes, is a cooling company;

When engaged in the business of operating a street, suburban or interurban railroad company, wholly or partially within this state, whether cars used in such business are propelled by animals, steam, cable, elec-

tricity, or other motive power, is a street, suburban or interurban railroad company;

When engaged in the business of operating a railroad, either wholly or partially within this state, on rights-of-way acquired and held exclusively by such company, or otherwise, is a railroad company.

By examination of Sections 5475-5478, inclusive, General Code, being Sections 86 to 89 of the Act of 1911, and Sections 5481-5487, inclusive, General Code, being Sections 92 to 98 thereof, as set forth in "Appendix A" of this brief, the court will observe that not all of the "public utilities" designated in Section 5415, and defined in Section 5416, supra, are subject to any excise tax of the kind and character now under consideration. The "utilities" not so taxed are the fourth, fifth and sixth of those defined in Section 5416, viz: sleeping car, freight line and equipment companies.. Indeed, these "utilities" are subject to but one extraordinary tax, and that in lieu of property taxes—a tax, in short, similar to those passed upon by this court in Pullman Palace Car Company vs. Pennsylvania, 141 U. S., 18; such tax being in name an "excise tax" but in fact a tax upon rolling stock passing through the state, and not acquiring any fixed situs for property taxation at any definite place. (See, as to this tax, Sections 5462 to 5469, General Code of Ohio; Sections 73 to 80, inclusive, of the act of 1911.)

These three companies, then, may be eliminated from the catalogue of public utilities which are subject to the excise tax, and to certain property taxes. Their elimination leaves the list of "public utilities" as follows:

1. Express companies;
2. Telephone companies;

3. Telegraph companies;
4. Electric light companies;
5. Artificial gas companies;
6. Natural gas companies;
7. Pipe line companies;
8. Waterworks companies;
9. Messenger companies;
10. Signal companies;
11. Union depot companies;
12. Water transportation companies;
13. Heating companies;
14. Cooling companies;
15. Street, suburban or interurban railroad companies;
16. Railroad companies.

We ask the court to seek, first, for the purpose of determining the fundamental nature of the "privilege" which is taxed as to each one of them, some element which the respective businesses of each one of these kinds of "public utilities" *possesses in common with all the others.* Is there such a common element; and, if so, what is it?

The privilege of exercising the right of eminent domain is not such an element. Express companies, artificial gas companies, natural gas companies, messenger companies, signal companies, water transportation companies, heating companies and cooling companies do not enjoy this privilege under the laws of Ohio. The other companies enumerated in the section above quoted do enjoy such privileges under the laws of the state, which we do not feel it necessary to quote for the court's purposes. It is sufficient, for the present, to note that substantially half of those characterized as "public utilities" enjoy this special grant of power from the state, and the remaining half

do not enjoy such a grant. There are differences in the *rates* of taxation as among the different classes of public utilities, which said differences have given rise to one of the questions presented in these cases. The possession of the privilege of exercising the right of eminent domain as to some of these companies, and its denial to others, may afford some reason for classification upon the rate basis, if this privilege enters into the subject of taxation at all. It is clear, however, that though the right of eminent domain may be an element which is taken into consideration in some manner, in fixing the rate of the tax, it is not an element common to all the "privileges" taxed.

Some assistance may be here derived from the use of the term "public utility," which, as counsel for the appellants point out in their brief, has a certain well understood meaning. We shall hereinafter show the manner in which the legislature of Ohio came to employ this term, and shall contend that from the viewpoint of classification, and the alleged denial of equal protection of the law, the term is an artificial one. We shall demonstrate, we think, that the General Assembly of Ohio, nowhere evidenced an intention to tax all business charged with a public interest as such, but simply characterized as "public utilities" those engaged in carrying on certain businesses already taxed under prior laws without the use of any such descriptive term. However, we are willing to concede the correctness of the proposition upon which is based, as a major premise, the argument of counsel, in support of the second point urged by them, in the portion of their brief commencing at page 52 thereof, to this extent, viz: the one attribute which all of the subjects of excise taxation men-

tioned in Section 5417, General Code, have, is that they are businesses charged with a public interest.

The *effect* of charging a business with a public interest has been defined by this court in the leading case of Munn v. Illinois, 94 U. S., 113, in which Mr. Justice Waite, delivering the opinion of the court, used the following language, on page 126:

> "Property does became clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, *grants to the public an interest in that use*, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus granted."

Does this implied grant to the public, of an interest in a given business, constitute, as to the proprietors of the business, a "privilege?" It would seem paradoxical so to hold. The practical result of charging a business with a public interest need not be elucidated to this court by citation of authorities, or otherwise. It constitutes a *burden* upon the business and is, at all events, not productive of increased revenue, at least of itself. It results in the imposition of regulations, legislative and administrative in character, and of obligations enforced judicially. It is restrictive in its effect.

All this, on the surface, seems to follow from the fact that a business has become charged with a public interest.

But beneath the surface counter currents are discernible, the nature of which becomes apparent when one considers the *manner* in which a business becomes charged with a public interest. How this may come to pass is pointed out with great clearness in Wyman on Public

Service Corporations, Volume 1, Chapters 2 and 3. In the first of these chapters the author considers what he calls "legal privilege" as a means of charging a business with a public interest, stating in substance, in Section 50, that it is a mistake to suppose that a "public utility," or, as he calls it, a "public employment," can be created under our present constitutions by legislative fiat—that is, the grant of exclusive privileges. A few sentences show the trend of the author's thought here:

> "It would seem, therefore, that the effect has sometimes been mistaken for cause here; that although many of these special privileges often accompany public employment, the truth is that these very privileges could not have been validly granted unless these businesses were public in character. It is submitted, therefore, * * * that under our constitutional system no special privileges can be granted except for a public purpose. * * * The question thus arises whether the conditions of virtual monopoly, however caused, may not give rise to public calling if the state has had no hand in the establishment of the situation. * * * It is common to argue that because a certain business has had a certain privilege granted to it, the consequence of that limitation is that the business is put by the courts in the class of public callings. But the real truth of the matter seems to be in the opposite statement, that no business can be granted a privilege under our constitutional system unless it is public in character."

In the second of these chapters, and in particular in Section 90 of his work, Professor Wyman states the true method by which a business may become charged with a public interest. His language is as follows:

> "It is common knowledge that there are certain businesses which are so affected with a public interest that those who undertake them must serve a public properly. It is thus the *character of the business*

> which makes it public and this character it takes *from the conditions surrounding the business.* This is most clear in the case of those businesses which have by reason of physical limitation a *natural monopoly.*"

Following this statement of the general principle, the author enumerates several conditions which may produce natural monopoly, such as restriction of supply, scarcity of sites, limitation of time, difficulty of distribution, cost of the plant, service on a large scale, inadequacy of available substitutes, etc.

From what the author states thus in detail, it is apparent that he has correctly stated the general principle in the first section of his work, when he says:

> "The causes of this division (between public callings and private businesses) are, of course, rather economic than strictly legal; and the relative importance of these two classes at any given time, therefore, depends ultimately upon the industrial conditions which prevail at that period."

What, then, is that condition or attribute of a business which makes it a "public utility?" Manifestly, it is found in economic conditions which constitute the business a *virtual monopoly.* The state does not create these conditions; in fact, the sole part the state plays with respect to them is that its regulatory or police power is invoked to curb the possible evils that follow from such economic causes.

Nevertheless, there is here a real "privilege;" a subject from which the state may legitimately draw special exactions, by way of taxation—from which indeed all the states in the Union have, since the dawn of the present in-

dustrial era, drawn largely for the support of their several governments, as the court, of course, is well aware.

That such is the law, in Ohio in particular, is well established by the case of Zanesville v. Gas Light Company, 47 O. S., 1. The question before the court in that case was as to whether or not a gas company, which made no avowal of public service by way of holding itself out as engaged in a public calling, was subject to the delegated power of a municipality to regulate rates of service. The following significant language is found in the opinion of Minshall, C. J., at page 33:

> "It is also argued that a gas company does not come within the reasoning of the principle upon which these cases (meaning Munn v. Ill., supra, and State ex rel. v. Gas Company, 34 O. S., 572) have been decided; that it does not devote the use of its property to the public; that it simply manufactures gas at its works, and then sells it to the consumers, as the manufacturer of any other articles; and that the public have no use of its property, as in the case of warehouseman * * * It is true the public has not the use of the property of a gas company as it has of a ferry, nor probably, as it has of a warehouse, yet a gas company controls and supplies a public want, in a position that gives it, or may do so, *a virtual monopoly of the supply;* and so far as the public is concerned, it is immaterial whether the manner in which the want is supplied is termed a *letting* or *selling* of property or service. It is the virtual monopoly of the supply of the want that gives to the public the right to regulate the price demanded for it."

In connection with this case the case of The Cincinnati Gas-Light & Coke Co. vs. State, 18 O. S., 238-243, cited by the court below, is especially interesting; but we forbear extended quotation from that decision.

We submit, therefore, that the first and primary element of "privilege" involved in the carrying on of the business of a railroad company is the attribute of natural or virtual monopoly inherent in the business, not by reason of any positive grant by the state, but by reason of the operation of economic laws.

But there is a second element of the privilege of carrying on such business which must also be taken into account. We refer to the subject of taxation suggested by the language used in Southern Gum Company v. Laylin, supra, both in the opinion and in the syllabus. The portion of the opinion bearing upon the point which we have in mind is as follows:

> "An excise tax may also be imposed on corporations to compensate the state for the additional burden sustained by the state and its people, by reason of property being held by artificial bodies, the persons comprising such bodies being exempt from liability to a great extent for the debts thereof. This ground of excise taxation was recognized in Adler v. Whitbeck, 44 O. S., 539, and was there applied to the liquor traffic because that business was there shown to impose additional burdens upon the state."

Natural monopoly, as an economically created privilege, constitutes a burden on the state and upon the public, and to this extent the fact of monopoly becomes the basis of the tax in two aspects; but we are here referring to an additional element which counsel, in discussing this point, have wholly failed to appreciate. It is not alone because the utilities mentioned in Section 5417, General Code, require regulation through the machinery of the state public service commission that the businesess in which they are severally engaged constitute burdens upon

the public and upon the state. It is not alone because these appellants are incorporated companies, that, therefore, their existence, in common with that of other aggregations of capital with limited liability, impose a burden upon the public. It is also because of a variety of economic conditions other than the fact of natural monopoly that the occupations enumerated in the statute impose burdens upon the public and upon the state. Some of these economic conditions may be referred to, not with a view to exhausting the catalogue of them, but rather with a view to suggesting their nature—such as the large number of people whose interests are affected by the businesses themselves, resulting in the imposition upon the courts of the state of litigation largely exceeding in amount that arising out of any other equal number of occupations; the hazardous nature of them; the manner in which they are related to the necessities of the communities which they serve, aside from the question of monopoly.

The court below was not unmindful of this ground of taxation, referring to it in discussing the case of Adler v. Whitbeck, 44 O. S., 539, cited in the Southern Gum case The language of the District Court's decision on this point is as follows:

> "Some assistance is derived from Adler v. Whitbeck, 44 O. S., 539, which arose under a law the authority for whose enactment is based both upon the constitutional provision (Schedule, Sec. 18, Constitution of Ohio) that 'no license to traffic in intoxicating liquors shall hereafter be granted in this state, but the General Assembly may by law provide against evils resulting therefrom,' and the power of taxation granted in the same organic instrument. The law imposed a tax on the business of trafficking in intox-

icating liquors, and involved the exercise of both the police power (p. 563, and McGuire v. State, 42 O. S., 532) and the power to tax (pp. 562, 568, Anderson v. Brewster, 44 O. S., 583). It served a double purpose—the restraint of the evils resulting from the liquor traffic, and the creation of a revenue to indemnify the general taxpayer for the increased burden imposed on him by the business. The tax was said to be in the form and nature of a tax upon the business (p. 563), and in the Southern Gum Company case it is affirmatively characterized as an excise tax applied to the liquor traffic on account of the additional burdens imposed on the state. In this respect it is assimilated to the tax hereunder consideration, whose object is to compensate the state and indemnify the taxpayer for the increased burden resulting from the special inconvenience and expenses sustained and supervisory power exercised by the government over corporate public utilities and for the benefit of those who own and operate such. Ashley v. Ryan, 49 O. S., 504, 525; Cincinnati Gaslight & Coke Co. v. State, 18 Ohio St., 238, 243; Baker v. Cincinnati, 11 Ohio St., 534; Southern Gum Co. v. Laylin, p. 595; Western Union Telegraph Co. v. Mayer. The contention was made in the Adler case that the enforced payment of the tax on the business of trafficking in intoxicating liquors would impose on many of small means such financial hardship as to drive them out of business. The court recognized that such would be the consequence, but it did not deem the law invalid on that account (pp. 560, 561, 567), as such result would arise from extraneous circumstances and not from the law."

Counsel for appellants who discuss this point at pages 44 to 49 inclusive have wholly failed to appreciate the significance of the Southern Gum Company decision in this respect and the position of the District Court thereon. They first assume that the one ground of exaction due to burdens imposed upon the public and the state lies in the

fact that the *corporate franchise* imposes such burdens as those described in the Southern Gum Company case. Thus referring specifically to the above quoted paragraph from the decision of the District Court they say on page 44:

> "This involves the incorrect assumption which we have heretofore referred to, that this is a tax upon corporate franchises, as such."

Thereupon they adduce arguments in an effort to show that the tax involved in the cases at bar does not rest in part upon the corporate franchise as an element of the privilege. We disagree with counsel as to this point and shall treat of it presently. In this connection, however, we point out that we are not contending for the existence of a special ground of taxation in the case of the "utilities" enumerated in Section 5417 of the General Code of Ohio *because they are corporations,* but because of the economic conditions to which we have just referred.

Counsel's other comment upon the District Court's opinion in this particular begins at page 47 and is introduced by the following language:

> "Coming back to the liquor tax, and what was said by the court below with reference thereto, we submit that it is very clear that the present tax is not imposed for purposes of restraint, or to meet the expenses incident to utility regulation. It is a general revenue measure, and all taxes collected by the state treasurer under its provisions are credited to the general revenue fund."

This is *non sequitur* in view of the express language used in the case of Adler v. Whitbeck, and in view also of the law involved in that case. We quote so much of the present liquor law of the state as may serve to illustrate

our point, with the assurance that, despite numerous amendments since the case of Adler v. Whitbeck was decided, the present law is in all respects essentially similar to that then in force:

Section 6071, General Code of Ohio:

> "Upon the business of trafficking in spirituous, vinous, malt or other intoxicating liquor there shall be assessed yearly, and paid into the county treasury, as hereinafter provided, by each person, corporation or co-partnership engaged therein, and for each place where such business is carried on by or for such person, corporation or co-partnership, the sum of one thousand dollars."

Section 6090, General Code of Ohio:

> "Ten per cent. of the amount so placed on the duplicate and collected shall be set apart and paid into the state treasury to the credit of the general revenue fund, the remainder thereof shall be distributed as provided in Section sixty hundred and ninety-three."

Section 6093, General Code of Ohio.

> "The revenues and fines resulting under the provisions of this subdivision of this chapter shall be distributed as follows, to wit: In each county, three-tenths of the money paid into the county treasury on account of a business aforesaid, carried on in a city, village, hamlet or township therein, shall be passed to the credit of the general revenue fund of the state and paid into the state treasury by the county treasurer, as provided in other cases; five-tenths of the money so paid, on account of a business aforesaid, carried on in such municipal corporation or township shall be paid upon the warrant of the county auditor, into the treasury of such corporation or township, one-half to the credit of the police fund, and one-half to the credit of the general revenue fund thereof. In corporations having no police fund the entire five-

tenths shall be passed to the credit of the general revenue fund thereof, and in townships having no police fund one-half of such five-tenths shall be passed to the credit of the poor funds thereof."

Counsel fall into obvious error in assuming, as they seem to assume, that a tax ceases to be based upon special burdens and imposed for purposes of restraint, when its proceeds are credited to a "general revenue fund."

Counsel also cite Section 606 of the General Code of Ohio as amended in 1911 (page 48, appellants' brief) which provides in effect that the public service commission of Ohio may in any year assess upon the railroads and public utilities of the state, and cause to be collected from them, an amount not exceeding $75,000, to be apportioned according to their respective intrastate earnings or receipts. The argument is that the enactment of this section by the same session of the General Assembly which enacted the law under which the tax involved in the cases at bar are based, evinces a legislative intention inconsistent with the idea that any part of the excise taxes involved in the cases at bar is exacted for the purpose of compensating the state for the exercise of its regulatory power over public utilities.

In relying upon this joint interpretation of the two acts of the General Assembly of 1911 counsel for appellants make an unwarranted assumption. They find it necessary to presume that the $75,000 which is authorized by this section to be apportioned among the public utilities of the state is *adequate* for meeting the expenses incurred in regulating the utilities. Such an assumption cannot be indulged in. Indeed, counsel are driven to a peculiar position in this portion of their brief. They state in this im-

mediate connection, "if it should cease to be (adequate for that purpose) the legislature will in the future, as it has in the past, increase it from time to time." And at another place, viz, page 45 of the brief, they suggest to the court that the position which we are taking, and which is that more than one attribute or element enters into the "privilege of carrying on intrastate business" of a railroad, is not correct, because, as they say, "the state would find it embarrassing, if it should seek in the future, as it unquestionably has a right to do, to levy an excise tax upon any untaxed privileges possessed by any individuals or corporations now engaged in the several kinds of business falling within the present tax."

In other words, the position of counsel is that the present tax law of the state is to be construed *with reference to what the state may do in the future* by amending its laws. Such a principle would have precluded this court from reaching the conclusion which it did reach in United States Express Co. v. Minnesota, 223 U. S., 335, and in similar decisions in which, if we correctly understand them, the court sustained gross earning taxes based upon earnings both from interstate and intrastate business where no local property tax was imposed upon the subject of taxation. So that in the above quoted language of Mr. Justice Holmes in Galveston, Harrisburgh and San Antonio R. R. Co. v. Texas, supra, "the scheme of the statute was to establish a system—the two taxes together fairly may be called a commutation tax."

We submit upon this point that it does not follow that because the state legislature has authorized the public service commission to collect not to exceed $75,000 annually from the public utilities, it has thereby disclosed an

intention to constitute that $75,000 exaction the full extent of the exercise of its compensatory taxing power.

The error of counsel here lies, not alone in the fact that they are unwarranted in assuming that the sum of $75,000 constitutes the only compensation which the state attempts to exact by taxation from public utilities *for the support of the public service commission*, which is not necessarily true), but also in the fact that they incorrectly assume that the maintenance of the public service commission of Ohio is the only "burden against the state," to use the language of the Southern Gum Company case, which would constitute a ground of taxation. And counsel wholly fail to take into account the additional ground resulting from the burdens cast upon the *public* as distinguished from the mere expenses of government as such.

We submit, then, that a second element of the "privilege of carrying on the intrastate business of a public utility" is found in the burdens upon the public and upon the state government which result from the nature of the various businesses taxed; and that the District Court correctly held that this ground of taxation is "assimilated to the tax here under consideration."

But still another element is included in the "privilege of carrying on the intrastate business" of the utilities mentioned in Section 5417, General Code. That element is the subject of the tax considered in Southern Gum Company v. Laylin itself.

At the outset of our discussion of this point, we desire to make due acknowledgment of the fact that the excise tax law is applicable to individuals, partnerships and unincorporated associations as well as to corporations. So

much is apparent on the face of Sections 5415 and 5416, General Code of Ohio, above quoted. But it by no means follows, as counsel illogically insist at page 46 of appellants' brief, that as to those "public utilities" which are corporations the right to be a corporation does not enter into and become an element of the "privilege" taxed to them. There is no such dilemma as that stated by counsel at the page of their brief above cited. It is logically possible for the franchise to be a corporation to enter into the basis of the present tax in so far as it applies to corporations and not to enter into the basis of the tax in so far as it applies to individuals and partnerships.

But our contention, that the corporate franchise is an element of the subject of the present tax as to those taxpayers who possess it, is not founded upon the mere logical possibility of such a fact, but upon a clearly declared legislative intention to that effect.

Certain sections of the act of 1911 will, it is believed, perfectly disclose that intention:

Section 5495 of the General Code of Ohio (Section 106 of the act of 1911):

> "Between the first day of May and the first day of July, 1911, and annually thereafter during the month of May, each corporation, organized under the laws of this state, for profit, shall make a report, in writing, to the commission, in such form as the commission may prescribe."

Section 5498 of the General Code of Ohio (Section 109 of the act of 1911):

> "Upon the filing of the report, provided for in the last three preceding sections, the commission, after finding such report to be correct, shall, on the first Monday of July, determine the amount of the sub-

scribed or issued and outstanding capital stock of each such corporation. On the first Monday in August, the commission shall certify the amount so determined by it to the auditor of state, who shall charge for collection, on or before August fifteenth, as herein provided, from such corporation, a fee of three-twentieths of one per cent. upon its subscribed or issued and outstanding capital stock, which fee shall not be less than ten dollars in any case. Such fee shall be payable to the treasurer of state on or before the first day of the following October."

Section 5499 of the General Code of Ohio (Section 110 of the act of 1911):

"Annually, during the month of July, each foreign corporation for profit, doing business in this state and owning or using a part or all of its capital or plant in this state, and in addition to all other statements required by law, shall make a report in writing to the commission in such form as the commission may prescribe."

Section 5502 of the General Code of Ohio (Section 113 of the act of 1911):

"Upon the filing of the report, provided for in the last three preceding sections, the commission, from the facts thus reported and any other facts coming to its knowledge bearing upon the question, shall, on the first Monday in September, determine the proportion of the authorized capital stock of the company represented by its property and business in this state. On the first Monday of October, the commission shall certify the amount of the proportion of the authorized capital stock of each such company represented by its property and business in this state, as determined by it, to the auditor of state."

Section 5503 of the General Code of Ohio (Section 114 of the act of 1911):

> "On or before October fifteenth, the auditor of state shall charge for collection, as herein provided, annually, from such company, in addition to the initial fees otherwise provided for by law, for the privilege of exercising its franchises in this state, a fee of three-twentieths of one per cent., upon the proportion of the authorized capital stock of the corporation represented by the property owned and used and business transacted in this state, which fee shall not be less than ten dollars in any case. Such fee shall be payable to the treasurer of state on or before the first day of the following December."

The court will recognize in the above quoted sections the present form of the legislative idea embodied in the so-called "Willis law" of 1902, before the Ohio Supreme Court in Southern Gum Co. v. Laylin, supra.

The sections themselves, however, are no longer those of a separate act of the legislature of the state, but are embraced in the same enactment which provides for the collection of the excise tax involved in the cases at bar. It is, of course, a proposition quite elementary that whatever inter-relation appears as among different sections of the same legislative act is to be given such force as it may have with respect to the interpretation of any such section or sections. That is to say, it is not necessary for us to rely exclusively upon the doctrine, well established by the decisions of this court in Galveston, Harrisburg & San Antonio R. R. Co. v. Texas and Express Co. v. Minnesota, *supra*, in order to be justified in asking the court to consider the sections which we have just quoted, in so far as they may have any bearing upon the meaning of the sec-

tions of the same statute which impose the excise tax involved in the cases at bar.

With these principles in mind, then, let the court examine the sections of the act of 1911, imposing the franchise tax, as we have quoted them. It will at once appear to the court that, so far as quotation has been made from the act, there is no reason disclosed thereby, why corporations organized under the laws of the State of Ohio for the purpose of operating a railroad should be excluded from the payment of the tax of three-twentieths of one per cent. upon their issued and outstanding capital stock. On the contrary, if the sections which we have quoted stood alone, the appellants in the cases at bar would be liable, in addition to the excise taxes from which they seek to escape, for franchise taxes at the rate prescribed by the sections cited and on the basis therein referred to. So much indeed is admitted by counsel in argument at pages 45 and 46 of the brief, it being urged by them, as a counter proposition, that the state still has the power to impose a franchise tax upon appellants, and that, therefore, because it has the power, it cannot be presumed that the franchise privilege is an element of the privilege of doing business. But counsel fail to take into account the *reason* why appellants are not required to pay a franchise tax, which appears from the following sections of the law:

Section 5518 of the General Code of Ohio (Section 129 of the act of 1911):

> "An incorporated company, whether foreign or domestic, owning or operating a public utility in this state, and as such required by law to file reports with the tax commission, and to pay an excise tax upon its gross receipts or gross earnings as provided in this act, and insurance, fraternal, beneficial, build-

ing and loan, bond investment and other corporations, required by law to file annual reports with the superintendent of insurance, shall be subject to the provisions of sections one hundred and six to one hundred and fifteen."

Section 5418 of the General Code of Ohio (Section 42 of the act of 1911):

> "The term 'gross earnings' shall be held to mean and include the entire earnings for business done by any person or persons, firm or firms, copartnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, from the operation of any public utility, or incidental thereto, or in connection therewith. *The gross earnings for business done by an incorporated company, engaged in the operation of a public utility, shall be held to mean and include the entire earnings for business done by such company under the exercise of its corporate powers, whether from the operation of the public utility itself or from any other business done whatsoever.*"

Here we have it, as plainly stated as legislative language could possibly put it. Those corporations which, as operators of public utilities, are required to pay excise taxes on their gross receipts or gross earnings, are not to be subject to those sections of the act of 1911 which impose a franchise tax; but in return for this exemption from that tax they are to pay excise taxes based, not alone upon the earnings of such intrastate business as constitutes or is incidental to the operation of their utilities, but also upon the earnings of any and all intrastate business transacted by them as corporations. In other words, *corporate* public utilities pay excise taxes upon a basis different from that upon which such taxes are exacted from *individual* and *partnership* public utilities; *public utility corpora-*

*tions* are excused from the payment of the franchise tax exacted from *all other corporations.*

The situation presented to the general assembly of Ohio when it considered the enactment of the act of 1911 may be described as follows: It being desired to raise revenues by the imposition of excise taxes upon the privilege of doing public utility business, and franchise taxes upon the privilege of corporate existence, it was apparent that such legislation would affect three classes of subjects of taxation, considered from the point of view of the taxpayer, viz., the non-corporate public utility, the non-public utility corporation and the corporation-public utility. The first and second of these classes of taxpayers were possessors of but one taxable privilege within the purview of the privileges designed to be taxed by the legislation contemplated. The third class, however, was the possessor of both taxable privileges from which it was designed to exact revenue. Should the natural over-lapping of the two taxes be carried into the law to be enacted or should the process be simplified by the acceptance of one or the other of the two taxes, in lieu of its fellow, from those possessing both classes of privileges?

The Ohio legislature, as is evident from the quotations made from the law which it then passed, chose the latter alternative and elected to receive the excise tax in lieu of the franchise and excise tax combined, as to those possessing both classes of privileges, instead of receiving from them the franchise tax in lieu of the combined tax. This purpose it effected, however, not by stating an intention to exempt any corporate franchise as such from taxation. But, having used words which, by themselves, would reach all corporate franchises, in that portion of the law re-

lating to these subjects of taxation, it withdrew from the operation of that portion, by specific exemption, those corporations which were liable for the payment of the excise taxes. Then, as an assurance of absolute justice, in so far as such a result in a tax law might be approximated, it enacted Section 5418, General Code of Ohio, measuring the excise tax, not alone upon the earnings derived from the exercise of the privilege of operating a public utility in the strictest sense, but also upon the earnings derived from the exercise of the privilege of *being a corporation,* if there should be any such, other than the earnings from the operation of the utility and from enterprises incidental thereto.

The point of greatest significance about this legislation is, we think, the apparent intention of the General Assembly of Ohio, that every corporation shall pay *some* taxes, either the excise tax or the franchise tax; and that whatever tax is paid, the same shall constitute a full return to the state for the enjoyment or exercise of all the taxable privileges and franchises attempted to be reached by the revenue law of 1911.

This, we submit, is tantamount to the expression of an intention that each corporate franchise existing under or by virtue of the laws of the state shall contribute to the state's revenues, whether in the form of an excise tax or in the form of a franchise tax computed on the basis of authorized and outstanding capital stock.

It is false logic, therefore, for counsel to insist that the franchise to be a corporation is, as to the public utility corporations, liable for the payment of excise taxes, an untaxed thing—a subject of taxation which by additional legislation might be reached by the state. *If such ad-*

*ditional legislation were enacted, the law before the court in the cases at bar would have to be amended by it.* And any such amendment or repeal of the exemption section, unaccompanied by a corresponding amendment of Section 5418 would be of doubtful constitutionality.

The conclusion of all this is, of course, that the legislature of Ohio has *palpably* accepted the excise tax in lieu of the franchise tax. This constitutes the two taxes together, as to public utility corporations, *a commutation tax upon all the privileges and franchises intended to be reached by the legislation of 1911.*

Such a scheme of taxation will be judged as to its nature and effect by the principles laid down in Galveston, Harrisburg San Antonio Ry. Co. v. Texas, supra, and the other decisions of this court of similar import.

The argument which we have adduced upon this point, is not only justified by the express language of the Ohio statutes themselves, but also has been given judicial support.

True, the Supreme Court of Ohio has never been called upon to express an opinion as to the interpretation of the statutes upon which we rely, but some of the inferior courts of the state have had occasion since the enactment of the act of 1911 to consider these very points. These decisions are so recent that they have not yet found their way into the lower court reports of the state. Accordingly we attach to this brief the opinions of the Common Pleas Court and Court of Appeals of Franklin county, Ohio, in the case of the State of Ohio v. The Ohio Traction Company, as "Appendix C" hereof.

The precise nature of the question involved in this case will be easily apprehended by the court from an examination of the opinion of the court.

The following excerpts from the opinion of Kinkead, J., of the Common Pleas Court are given:

> "The policy of previous acts was to measure the excise tax by the gross earnings. But when the legislature came to enact one general law, embracing all the various laws and corporations taxed, in this manner, and bring them all within the jurisdiction of one administrative body—the tax commission of Ohio—we are to arrive at the construction of the various parts of the law by ascertaining its manifest purpose and meaning by its general aim, purpose and scheme as well as by its language. * * *"
>
> "It is claimed that the imposition of such a tax as is made by the tax commission operates as a discrimination or unequal taxation between individuals and corporations.
>
> "It is the opinion of the court that this objection is not well founded in reason or in fact.
>
> "It is answered by stating that while corporations and natural persons are both classed as persons within the meaning of the constitution, they are in different classes when it comes to the application of the tax law under consideration. * * *"
>
> "But when special privilege is given by the state to a corporation to act in a corporate capacity, such privilege may be taxed as it is beneficial, and a tax upon that privilege does not discriminate as between the individual and the corporation."

The court will observe the following language in the opinion of Allread, J., of the Court of Appeals, discussing the mooted constitutionality of Section 5418, General Code (section 42 of the act of 1911):

> "It is also contended that the act is unconstitutional as applied to investments not incidental to or connected with the utility itself because of discrimination.

"The uniformity clause of the state constitution does not prevent reasonable classification of legislative subjects. So long as the owners of a utility choose to conduct it as individuals or as co-partners the excise tax would naturally be confined to the earnings of the utility, but when the owners of the utility obtain the additional advantage of an incorporation to conduct that business and hold over independent investments, they are liable to such reasonable privilege taxes as the state may impose.

"The excise tax law as founded upon the statutory definition of the term 'gross earnings' *contemplates a combination utility franchise and corporation franchise tax.* The constitutionality of each when employed separately has been sustained and we can see no good reason why they may not be charged in combination under one charter."

Referring to "Appendix B," page 182 of this brief, the court will observe that the idea of accepting the excise tax from public utility corporations in lieu of that tax and the franchise tax combined did not originate in 1911, nor even in 1910, the year in which all the laws of a similar character were repealed and re-enacted into a single act, and committed to the administration of the newly created tax commission of the state; but that the idea is as old as the franchise tax itself. Although the excise tax idea originated, as already stated, and as further apparent from Appendix B, in 1896, the act imposing this tax was virtually repealed and re-enacted by the same session of the legislature which enacted the original Willis law imposing franchise taxes, and both acts were passed within the space of a few days. See Appendix B, pages —— and ——; 95 O. L., 124, 136. Section 7 of the original franchise tax law, quoted in Appendix B, provided in part as follows:

> "Provided that electric light, gas, natural gas, water works, pipe line, street railroad, electric interurban railroad, steam railroad, messenger * * * and other corporations required by law to file reports with the auditor of state * * * shall not be subject to the provisions of the preceding sections of this act. * * *"

It may be objected that, because the excise tax law was in force for a number of years previous to the enactment of the franchise tax law, therefore, it cannot be supposed that the franchise privilege constitutes an element of the excise tax; for, during the period in which there was an excise tax but no franchise tax, the state had evinced no intention of taxing franchises as such.

This does not follow, for the sufficient reason that the state did not enact the franchise tax law without consideration of the excise tax law, and without making the enactment of the one and the re-enactment of the other virtually a single scheme of legislation. Furthermore, when the excise tax law was amended, the only substantial change made in it was to double the rate of taxation; an act certainly referable, with propriety, to the idea of bringing additional elements into the privilege tax.

Under the law as it then existed it was held, in State vs. Cleveland & Pittsburg R. R. Co., 13 O. N. P., N. S., 671, that by virtue of Section 7 of the original act passed April 11, 1902, those enumerated corporations, and those only, which by reason of being engaged in the operation of one of the utilities mentioned in the other act passed approximately at the same time, were subject to the payment of the excise taxes, were exempt from the payment of the franchise tax. In other words, the mere fact that a corporation might

be organized for the purpose of operating a railroad did not exempt it from franchise tax; in addition thereto *it must actually operate* the railroad and become liable for excise taxes.

It is thus apparent that exemption from the franchise tax was at all times predicated upon the payment of the excise tax.

The District Court apparently adopted the view that the enjoyment of the corporate franchise constitutes an element of the privilege taxed by the law involved in the cases at bar, as the language already quoted from its opinion discloses. In short, we feel justified in making the statement that although no court of last resort has yet passed upon this precise question, every lower court, both state and federal, which has had the opportunity to consider it, has accepted the view that the excise tax is received from corporate public utilities in lieu of and commutation for the payment of the franchise tax, so that the franchise itself is to be regarded as an element in the privilege taxed by the former.

Indeed, counsel for appellants, in combating this idea, at page 47 of their brief, perhaps unconsciously, supply the very strongest argument in support of it. They point out, correctly, that under the general corporation laws of Ohio, as construed by the Ohio Supreme Court in State ex rel. v. Taylor, 55 O. S. 61, a corporation may not lawfully be formed for more than one purpose, except under statutes specifically providing to the contrary. So that the theory of corporate existence in Ohio is the combination of capital in furtherance of a single object; from which theory the legal presumption results, that all activities of a given corporation, and all investments made by it of the capital

contributed by its members, or produced by its investments, and all earnings and profits resulting from its business and investments, are referable and incidental to the accomplishment of the one defined purpose. Counsel might have sustained this very view also by the citation of Mr. Justice Brewer's language, in Adams Express Company vs. Ohio State Auditor (rehearing), 166 U. S., 185-223, to the effect that "*presumably*, all that a corporation has is used in the transaction of its business"; and by citation of other authorities to the same effect, as State ex rel. v. Taylor, supra, from the Ohio decisions.

So that, it would be true, even without Section 42 of the act of 1911, Section 5418, General Code of Ohio, that a corporation *organized for the purpose* of engaging in a public utility business, would *presumably* have to return as its gross earnings all of its earnings, from whatever source derived, under its corporate charter. This would not be the case in the absence of that statute with respect to a corporation doing a public utility business *incidentally* to the accomplishment of some other and paramount purpose declared in its articles of incorporation. An example of such a business is afforded by the case of a manufacturing company generating electric current for the development of the power necessary in its own business and selling the surplus or "night load," and distributing the same for domestic consumption. This, a very common practice in Ohio, at least, and one which could scarcely be considered ultra vires the corporation instanced, would nevertheless constitute the company an "electric light company" within the meaning of Section 5417, General Code of Ohio, above quoted.

It has always been the practice of the administrative officers of the State of Ohio (we may state aside from the record) to regard companies in such a situation as subject to the payment of excise taxes and, therefore, as excused from the payment of franchise taxes. But as to them, the presumption existing in the case of a corporation organized for the purpose of engaging in a public utility business could not be indulged; it could not be assumed that all that such a corporation might have or do would be possessed or committed in furtherance of the public utility purpose. The rule in such cases would be indicated by the decision of the Court of Appeals of New York, in People ex rel. v. Williams, 200 N. Y., 93, wherein it was held that a corporation organized for the principal purpose of constructing and operating a *subway* railroad, and lawfully and incidentally acquiring and operating *elevated* railroads, was not liable for taxes upon its entire gross receipts from both kinds of operations, under a law imposing such a tax upon the operators of "elevated railroads." The rule upon which the decision is based is stated by Hitchcock, J., at page 103:

> "It was doubtless assumed, and ordinarily would be the case, that a corporation operating an elevated road would not be engaged in operating another road of equal or perhaps superior importance, and that whatever other projects it carried on would be of minor importance and incidental to and largely comprehended within the scope of its principal undertaking as the operator of an elevated railroad. In such a case it would not be at all unreasonable to make it pay a tax for the exercise of its franchise in carrying on its primary and important undertaking, which included a percentage on its receipts from these secondary and minor sources, which were more or less the results of and dependent on its main enterprise. But we think

> that * * * it was not the purpose to make the statute so all comprehensive as to include the receipts from the employment of the franchise in ways which could in no sense be viewed as merely incidental to or a result of the operation of the elevated road."

So that the enactment of Section 42 of the act of 1911, which said section was new in that enactment, would have the effect of reaching the entire franchise of some companies which had theretofore been escaping full privilege taxes.

But the argument of counsel for appellants, at page 47, is inconclusive, even if accurate in all respects. Even if it be true as to *all* corporations which could in any way become subject to the excise tax law, that their gross receipts from the operation of their respective utilities and from other activities in connection therewith, or incidental thereto, would include their gross earnings from practically all sources, because of the Ohio rule respecting the purpose for which a corporation may be organized, does it follow, from this fact, that, therefore, a tax which reaches and is based upon the fruits of every corporate activity does not amount to a tax on the franchise to be a corporation? Counsel insist that the franchise is not taxed, though the entire business may be taxed; in the same context admitting that the very existence of the corporation itself is so bound up with the transaction of the business for which it was organized as to be inseparable therefrom.

We think the court will readily reach the conclusion, in this case, already expressed by it in State Tax on Railway Gross Receipts, 15 Wall., 284, wherein it was said:

> "It is not to be questioned that the states may tax the franchise of companies created by them, and that

> the tax may be proportioned either to the *value of a franchise* granted or to the *extent of its exercise;* nor is it deniable that gross receipts may be a measure of approximate value or, if not, at least to the extent of enjoyment."

The State of Ohio taxes some corporate franchises by a rule of valuation based upon the amount of the issued and outstanding capital stock; and when it taxes other corporations upon the extent of the exercise of their corporate powers, basing its exaction upon the gross earnings of the corporation from all of its activities and investments, it is, by reason of the authority just cited, taxing the franchise to be a corporation to the same extent as that subject of taxation would have been reached by the other tax.

Therefore, we submit that, in the light of the history of privilege tax legislation in Ohio; in the light of the express provisions of the act of that state now in force, and under which the taxes sought to be enjoined by appellants are assessed; and in the light of the authorities which we have cited, construing the law of Ohio both before and after the last amendment, the franchise to be a corporation constitutes an element which enters into "the privilege of carrying on the intrastate business" of a domestic railroad company or any other corporate public utility subject to that law.

Recapitulating, then, we find authority for the differentiation of three elements which enter into the privilege referred to, generally, in the law involved in the cases at bar, as "the privilege of carrying on intrastate business," viz., the advantages accruing to those who carry on the businesses mentioned in Section 5416, General Code, with

the exceptions already noted, from the operation of economic laws, constituting them, to a greater or less extent, natural monopolies; the detriment or burden upon the public generally, and the state, arising out of the nature of the businesses conducted, and the necessity for the exercise of regulatory police power and other functions of government with respect thereto; and, as to corporate public utilities, the enjoyment and use of the privilege of being a corporation, otherwise designated as the corporate franchise.

*The Application of the Value Limitation, So-Called, Referred to in Southern Gum Company vs. Laylin, to the taxation of Privileges Like That Taxed by the Law of Ohio.*

It is our first contention here that, as to two of the three elements entering into the privilege of conducting a public utility business under corporate organization, the so-called value limitation of the Southern Gum case does not apply at all; and that, as to the third of them, the value limitation, if it does apply, does not preclude the Ohio legislature from measuring a tax thereon (if that were the only element involved) by the gross earnings of the corporation as distinguished from its net earnings.

We have already analyzed the Southern Gum Company decision and have pointed out that in speaking of the "value limitation" and in drawing the analogy between the taxation of some privileges and franchises and the levying of special assessments for public improvements, the Ohio court quite evidently limited its application of the doctrine announced in the third and fourth branches

of the syllabus to the taxation of privileges and franchises created by the sovereign power of the state itself. When, as was said by the court in that opinion, the state has created a corporation and has invested it with life and continued existence, it has by its own act conferred a special benefit upon the corporation. This special benefit may be made the subject of a tax, but if the tax exceeds the value of the special benefit, then, as to the excess, it constitutes a taking of private property for public use without just compensation, and a deprivation as to those thus taxed of the equal benefits of government.

But at the risk of still further repetition, we point out again that in the Southern Gum Company case, the court went on, after laying down the principles already alluded to, to distinguish another kind of excise taxation—one essentially different in theory from the taxation of the corporate franchise as such. This kind of excise taxation was referred to in the syllabus in the following language:

> "An excise tax may *also* be imposed upon corporations to compensate the state for the additional burden, etc."

And in the opinion in support of this proposition the case of Adler v. Whitbeck, supra, was cited.

We submit that there is certainly no intimation in the Southern Gum Company case that excise taxation of the kind referred to in the fifth branch of the syllabus is subject to the "value limitation" upon the taxation of state created privileges and franchises referred to in the earlier branches thereof; and we submit also that the necessary *inference* from the language of the court is that such excise taxation on the ground referred to in the fifth branch of the syllabus is *not* subject to this "value limitation".

The court quite evidently meant to distinguish the two grounds of taxation.

But if the intention of the court in this particular is not clear does it not follow from the nature of things that the "value limitation" referred to in the Southern Gum Company case cannot apply to excise taxation upon the ground now under discussion? Let the court consider for a moment the Ohio court's own statement of what the "value limitation" is. The language of the opinion is as follows:

> "These provisions of the Constitution * * * limit such taxation to the reasonable value of the privilege or franchise conferred originally or to its continued value from year to year."

Now let the first two elements entering into the privilege of doing an intrastate public utility business, as we have differentiated them, be considered with respect to the possibility of applying any such limitation to their taxation. The first element is that attribute of a public utility business which results from its economic advantages as a natural monopoly. Are these advantages subject to appraisement, either in gross, as relating to a particular business in the abstract, or in an individual case? Possibly they are. In all probability the General Assembly of Ohio in fixing the rates of excise taxation among the several utilities taxed has roughly, but nevertheless as accurately as the nature of the case permits, made its own appraisement of the relative values of these monopoly elements of privilege.

But we may be permitted in a few words to consider the consequences of attempting to apply the "value limitation" in an appraisement of the monopoly element of the privilege from both of these angles of view. Taking the

first of them, and considering the possibility of appraising the value of the monopoly element of the privilege as inhering in the business as such irrespective of the varying circumstances of individual cases, would any court, notwithstanding what was said in the Southern Gum Company case, undertake to review the action of the General Assembly of Ohio in fixing rates of taxation, and thus, in a way appraising the value of this element in part? We submit that this cannot be done with any degree of certainty. The only possible ground of invoking a court's interposition from this point of view would be that the very basis of taxation irrespective of the rate thereof, that is the very fact that *gross* earnings are a factor in the computation of the tax, is itself sufficient to condemn the law as violative of the limitation. Indeed, this is the position to which counsel are ultimately driven, and we shall have more to say in the proper place respecting the fallacy here involved.

Consider, then, the consequences of invoking a court's jurisdiction with a view to appraising the monopolistic element in the value of the privilege of operating a *particular* railroad. What the courts would be called upon to do, if permitted to exercise such jurisdiction, would be presumably what the taxing officials of the state would be required to do in the first instance in assessing the tax (unless, as already suggested the entire basis of taxation is itself a false one).. Would, then, a state tax commissioner, or in its stead, a court, reviewing its action, be required in each individual case to determine the truth of allegations like those in the bills in the two cases at bar, to the effect that the original investment was a prudent one and that the management has been careful and eco-

nomical, so that the failure to reap profits is not attributable to opposite conditions of this kind. Is it a limitation upon the taxing power of the state with respect to privileges that before levying or assessing any tax upon any particular taxpayer as the possessor of a taxable privilege, an inquiry must be made into the wisdom of his original investment and into the care and economy with which he has managed his business? Yet this is precisely the object sought to be accomplished by the suits in the cases at bar in so far as they are based upon the supposed right of the individual subject to taxation to invoke the alleged constitutional limitation of Ohio.

If the court cannot embark upon any such investigation as is suggested, with a view to appraising the value of a specific privilege in the hands of a given individual would the court nevertheless exact an equivalent process of the legislature or the administrative authorities of the state?

We submit that either of the rules contended for by counsel cannot possibly be applied practically to the valuation of that element of the privilege upon which appellants are taxed, which consists of the attribute of natural monopoly.

But if the appraisement or valuation of the first of the three elements entering into the taxable privilege possessed by appellants is at the best a thing practically impossible, what shall be said of an "appraisement" of the second element of "privilege" which we have discerned therein, and to which the district court has given its assent? That element consists of the burdens imposed by the very existence of the enumerated public utilities upon the public or the state generally and upon its government. Can a *burden* possess the attribute of *value* to the one re-

sponsible for its existence? In a sense such a burden may be said to have a value as being a *detriment* to the public and the state co-ordinate with certain *benefits* to the public utilities; and it is possible in the academic case for the pecuniary amount of detriment to be measured. But we would challenge the possibility, in a practical sense, of any such measurement; and on the academic side we would submit without further argument, that the detriment to the community and the burden upon the state, bear no relation whatsoever to the profitableness of the business from the standpoint of the one engaged therein. Let the court refer again to the case of Adler v. Whitbeck, supra, for an example of a tax justified by this very ground of taxation, and one similar to a tax which the Supreme Court of Ohio in Southern Gum Company v. Laylin, supra, said might have been imposed upon corporations as such. That tax, in its present form, as the court has found from examination of the statutes of Ohio above cited, is assessed in bulk upon each place where the business taxed is conducted, in the amount of $1000.

Could it be said that the detriment to the community and the burden upon the state and its governmental subdivisions would be appreciably less as a result of the conduct of the liquor business at a place where it was conducted at a loss than at a place where it was conducted at a profit?

We submit, therefore, that in reason, and upon the authority of the Southern Gum case itself, the "value limitation" on the taxation of state created franchises or other privileges, mentioned in that case, cannot be applied to taxation in part based upon the public burdens resulting from the transaction of a particular business.

Coming now to the third element entering into the "privilege" which is reached by the present tax, we find that this element of the privilege is the same one which is the subject of the particular tax involved in Southern Gum Co. v. Laylin, supra. Being such, this element of privilege, *if constituting the entire subject of the tax,* could be taxed only under the "value limitation" laid down in Southern Gum Co. vs. Laylin; being however but one of three elements reached by the tax, we submit that the value limitation cannot be applied to the whole tax, because the other two elements are not subject to that limitation. This proposition seems to us to be self-evident.

We contend, therefore, that whether the so-called "value limitation" of the Southern Gum case may be invoked by an individual to prevent the exaction of the tax from him, or may only be invoked by him as the representative of *a class,* for the purpose of questioning the constitutionality of the entire law, the limitation itself cannot be in either way applied to the excise tax on the privilege of doing an intrastate public utility business, separable as it is into the elements which we have described.

*Conceding, for Argumentative Purposes, that the Tax Involved in the Case at Bar is Subject to the Constitutional Value Limitations Referred to in Southern Gum Company vs. Laylin, Those Limitations Cannot be Invoked by a Single Taxpayer on a Showing that his Business is Unprofitable.*

We have contended and still contend that the "value limitation" cannot be applied at all or in any way to the exercise of the taxing power with respect to the privilege

reached by the present tax. We are equally certain that if the value limitation could be said to apply at all, it cannot be invoked as appellants in these cases have attempted to invoke it.

Discussion under our last caption naturally resolves itself into subordinate propositions. The first of these may be stated thus:

*A showing by a single taxpayer that a privilege tax to which he is subject probably exceeds the value of the privileged element in his own business, unaccompanied by any showing whatever as to the operation of the tax throughout the whole field of its application is insufficient upon which to base a finding that the tax law as such is unconstitutional.*

We need not discuss this question fully. Appellants, as plaintiffs in the court below, did claim (if we understood them correctly) that the tax is unconstitutional throughout the whole field of its application, because of its alleged effect as to themselves in this particular. On page 50 of their brief filed in this court, however, they make the following statement:

> "We concede that the tax, as a whole, may not be overthrown because, as applied to appellants, it exceeds the value of their privileges respectively * *."

Indeed, the fruitlessness of taking any other position must have appealed to counsel, in the face of the undisputed principle laid down by Judge Cooley, in his work on Taxation, third edition, 390, 391, wherein he says:

> "It cannot be too distinctly borne in mind that any possible system of tax legislation must inevitably produce unequal and unjust results in individual instances; and if inequality in result must defeat the general law, then taxation becomes impossible, and

> government must fall back upon arbitrary exactions. But no such impracticable principle is recognized in revenue laws. While equality and justice are constantly to be aimed at, impossibilities are not demanded. Tax legislation must be practical. * * * The legislature must judge of the general result, and when the law has apportioned the tax, individual hardships must be regarded as among the inconveniences which are incident to regular government. The same necessity that justifies any taxation will justify and sustain any reasonable provisions for giving it effect. The necessity of the state and of reasonable provisions for the security of the individual must be equally considered; the state is no more to be deprived of its revenue, because of individual hardships resulting from general rules, than is an individual to be stripped of his property without law, because in its necessity the state finds it more convenient to take it thus than by regular proceedings. The incidental hardship or inconvenience must be submitted to in either case."

As pointed out by the District Court, this principle is supported by many Ohio decisions; among them, Marmet v. State, 45 O. S., 69; State ex rel. v. Ferris, 53 O. S., 314, 326; Cincinnati Gas Light & Coke Co. v. State, 18 O. S., 238; State vs. Hipp, 38 O. S., 225; and Ashley v. Ryan, 49 O. S., 504, 525, 326; and, as already pointed out in this brief, these decisions cannot be regarded as modified, or their effect in any way impaired by anything which was said by the Ohio court in Southern Gum Co. v. Laylin, supra, because some of them are cited with approval in its opinion in that case.

By examining the bills of appellants, it will be ascertained that their formal allegations attempt to make no showing whatever as to the effect of the excise tax law throughout the entire field of its application; but are con-

fined to the facts of their particular cases respectively. Realizing that upon constitutional questions of this sort, the court's judgment is not foreclosed by any lack of allegations of fact, of which the court may take judicial notice (such facts being the only ones upon which a determination of unconstitutionality can be predicated—Muller vs. Oregon, 208 U. S., 412), we have dealt incidentally with the effect of the law throughout the entire field of its operation. In view, however, of the admission made by counsel for the appellants, and in view of the conclusiveness of the authorities upon the point, we deem it proper that this subject be dismissed from further consideration in this brief.

*Whatever be the method of applying the value limitation it cannot be invoked by a single subject of taxation so as to excuse him or it from the payment of a privilege tax, other possessors of the privilege remaining subject thereto.*

We come now to deal with one of the two most palpable of the many fallacies latent in the argument of counsel respecting the application of the case of Southern Gum Co. v. Laylin, supra.

In the paragraph of appellant's brief, on page 50, from which quotation has already been made, counsel proceed to state that,

> "We insist that, under the Laylin case, they (appellants) may claim individual protection of their own property, from confiscation."

Other intimations to the same effect are found elsewhere in the brief. It is not our purpose to quote all of them, but we may cite a few instances:

> "We submit that the court's language shows clearly an intention to give such construction to the Ohio

Constitution as would protect the individual possessor of a privilege from a tax on that privilege, as such, which should exceed its value * * *."

(Pp. 43, 44, Appellants' Brief.)

"We contend that the right of private property is an individual and not a class right, and that the constitutional guarantees which protect it are for the benefit of the individual, and may be invoked by him without reference to whether or not the measure in question may confiscate the property of others."

(Appellants' Brief, p. 49.)

In the first place, as we have already pointed out, counsel for appellants have utterly misinterpreted the Southern Gum decision itself, overlooking, seemingly, the language of the last paragraph of the opinion, wherein Judge Burket states the court's conclusion that,

"The tax of one-tenth of one per cent. on the amount of the subscribed or issued and outstanding stock * * * does not appear to be above the continuing value of the *franchise of corporations* from year to year, and is therefore within the clear power of such taxation by the General Assembly."

In our analysis of the decision in the Southern Gum case, we have shown, we think, that the Ohio court therein, so far from intimating that a "privilege" of the kind held by it to be subject to the value limitation which the court itself defined might be appraised from year to year, in the hands of each individual possessor thereof, and the limitation invoked for his protection, clearly intimated that the continuing annual value of all corporate privileges, equal in extent when they emanated from the state originally, is itself equal. That is to say, suppose two corporations organized within the same year, with the same authorized

capital stock, all of which in each case is immediately issued; these corporations would pay, under the law passed upon by this court in Ashley v. Ryan, supra, the same initial fees or taxes; at the end of the first year, both of them being prosperous, they would pay the same annual franchise tax. But suppose that, at the end of the third year, one of the corporations has become insolvent, and the corporate franchise as such has ceased to be an absolute thing of value to its possessors, has become instead a burden to them (mitigated, of course, by the fact that the individual liability of the members is limited to the payment of their stock subscriptions in full); the Willis law, passed upon by the court in the Laylin case, would exact from the two corporations still the same amount of fees or taxes, notwithstanding the unprofitableness of the one enterprise, and notwithstanding, too, the reasons for that unprofitableness. So much appears on the face of the Willis law.

Did, then, the court in the Laylin case mean to anticipate such a proposed state of facts, and to hold that in the event of such circumstances the insolvent corporation should not be liable for the payment of the annual tax for the years in question? We cannot reconcile any such interpretation of the Ohio court's decision with the language used by the court itself, when it said, through Judge Burket, that "the tax of one-tenth of one per cent. does not appear to be above the continuing value of the franchise of corporations from year to year."

Indeed, reflection will disclose that no such proposition as that which counsel for appellants say they find in the Southern Gum case could have been decided by that court. As we stated, in introducing our analysis of the decision

itself, the case was, quite apparently, a "test case," brought at the very threshold of the administration of the franchise tax law. The question before the court was as to the power of the General Assembly of Ohio to *pass such a law*—not as to the power of the secretary of state, to whom its administration was committed, to exact a specific tax from a given corporation in any one year. All that the court said about limitations on the legislative power related to that power itself, and its primary exercise. Thus, in the very paragraphs of the syllabus upon which counsel themselves rely so strongly, the court say:

> "While there is no express limitation upon the *power of the General Assembly* to tax privileges and franchises, *such power* is impliedly limited. * * *
>
> "By reason of these limitations, a tax on privileges and franchises cannot exceed the reasonable value of the privilege or franchise originally conferred, or its continued annual value thereafter."

Now, the law before the court, and which, in the face of these limitations, was held in the concluding language of the opinion to be an enactment "within the clear power of such taxation by the General Assembly," provided on its face that "the mere retirement from business or voluntary dissolution of a domestic or foreign corporation, without having filed * * * (a certain) certificate * * * shall not exempt it from the requirement to * * * pay fees * * *"

The law itself, on its face, contained no provision to the effect that an insolvent or virtually defunct corporation was to be excused from the payment of the annual fee. It failed to authorize the secretary of state to make any official determination as to the "continuing annual value" of

a specific and particular corporate charter. Yet, counsel for appellants would persuade this court that what the Ohio court held in Southern Gum Co. v. Laylin was that these provisions, lacking in the law before the court there, would have to be read into the law, in order to make its application to individual subjects of taxation constitutional. We submit that, if counsel's interpretation of those parts of the opinion and syllabus in the Southern Gum case, which lay down the principle of the value limitation, is correct, Section 7 of the Willis law, to which we have just referred, would have to be regarded as unconstitutional. But the court came to no such conclusion, holding that the act as a whole was clearly within the power of the General Assembly, and that the rate and method of computation of the franchise tax imposed by it did not produce a tax in excess of the value of the franchise of a corporation. Certainly, this conclusion amounts to a declaration that the law, as enacted by the General Assembly, was a valid exercise of the taxing power under the limitations as to value; and does not amount to a holding that in the future the question as to the value of each separate corporate charter could be reopened and determined by any court or executive officer.

In short, we submit that when the court in the Laylin case found the tax of one-tenth of one per cent., based upon the issued and outstanding capital stock of domestic corporations, was not above "the continuing value of the franchise of corporations from year to year," it, in substance, found that such a tax was not above the annual value of the franchise of any corporation, solvent or insolvent, profitable or unprofitable, whether voluntarily dissolved or not—in short, regardless of the financial condition of the business of the corporation.

We submit, also, that the determination which the court made was as to the effect and validity of the legislation of the General Assembly, *at the time of its enactment*, and with respect to the tax as a tax.

So, it appears, on the face of the Southern Gum decision, that the Supreme Court of Ohio never intended to hold that the value limitation of which it spoke in said case could be invoked by individuals suffering peculiar hardships; but that every inference from the conclusion which the court actually reached indicates that an individual subject of taxation cannot invoke these limitations so as to escape a tax to which others might continue to remain subject.

The District Court held that the Southern Gum decision could not be so interpreted as to justify the invocation of the value limitation by an individual in such a way as to excuse him from the payment of the tax; analyzing the decision as we have done, and citing authorities other than those we have cited in this brief, such as State v. Guilbert, 70 O. S., 253; Baker v. Cincinnati, 11 O. S., 541; Lewis vs. State, 69 O. S., 479; Lander v. Burke, 65 O. S., 532, 542; McNeill v. Hagerty, 51 O. S., 255, 265; Shotwell v. Moore, 45 O. S., 646; State Railroad Tax Cases, 92 U. S., 575; Flint v. Stone-Tracy Co., supra, etc. These decisions merely support the general principle so clearly stated by Judge Cooley, in the language already quoted from his work on taxation. Speaking of inequality in the result of a tax (and not by any means distinguishing between property taxes and privilege taxes with respect to this principle), the learned author says: "The incidental hardship or inconvenience *must be submitted to* in either case."

The fallacy of counsel for appellants here involves a basic misconception of the nature of the taxing power, as well as a misinterpretation of the Southern Gum decision itself. This misconception is apparent from the citation, for example, of the Missouri Rate Cases, 230 U. S., 474-508, at page 50 of the brief; and the case of Wilcox v. Consolidated Gas Co., 212 U. S., 19, and Northern Pacific R. Co. v. North Dakota, 216 U. S., 579, at page 27 thereof; as well as the citation of numerous special assessment cases therein. It is also apparent from the distinction which is attempted to be drawn at pages 41 and 42, between property taxation and privilege taxation. Elementary principles have been lost sight of. There is surely no distinction on the ground which we are now discussing between property taxation and privilege taxation; that is to say, counsel would surely not assert that under the Ohio constitution the *tax imposed upon property* may exceed the value of the property taxed, any more than the tax imposed *upon a privilege* may exceed the value of the privilege taxed. There is no intimation to this effect in the Southern Gum case. In speaking of the effect of Article XII, Section 2, of the Ohio constitution, in the opinion of the syllabus, Judge Burket and the court did not intimate that the exercise of the taxing power with respect to property, being limited by that section, was therefore not limited by the other sections commented upon by him; the holding was merely that as to such taxing power as might not be limited by Article XII, Section 2, the other limitations still applied.

Therefore, the distinction which counsel attempt to make between the cases at bar and the State Railroad Tax Cases, 92 U. S., supra, is based upon false logic.

Surely, too, counsel ignore the fundamentals, when they insist that constitutional guarantees of the inviolability of private property are for the protection of individuals, and therefore the validity of an exaction of a tax from an individual must be determined in each instance by ascertaining whether or not the amount apportioned to him exceeds the value of the thing taxed to him.

A variety of definitions of the term "taxation" may be found in the decisions of courts of last resort, and we would not burden this brief with exhaustive citation of such authorities. A few from the most eminent writer on the subject will suffice to show, for the present purpose, the essential nature of the taxing power as an attribute of sovereignty, and the distinction between that power, and the limitations upon its exercise, and the other powers of government with which counsel have confused it, and the limitations thereon:

> "The power to impose taxes is one so unlimited in force and so searching in extent that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; to every object of industry, use or enjoyment; to every species of possession; and it imposes a burden which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property. No attribute of sovereignty is more pervading and at no point does the power of government affect more constantly and intimately all the relations of life than through the exactions made under it.
>
> "Taxes are defined to be burdens or charges imposed by the legislative power, upon persons or property, to raise money for public purposes. The power to tax rests upon necessity, and is inherent in every sovereignty. The legislature of every free state will possess it under the general grant of legislative power, whether particularly specified in the constitution

among the powers to be exercised by it or not. No constitutional government can exist without it, and no arbitrary government without regular and steady taxation could be anything but an oppressive and vexatious despotism, since the only alternative to taxation would be a forced extortion for the needs of government from such persons or objects as the men in power might select as victims. (Citing, inter alia, McCulloch v. Md., 4 Wheat. 316, in the language of Mr. Chief Justice Marshall, at page 428; Loan Association v. Topeka, 20 Wall., 655, 664.)"

Cooley's Constitutional Limitations, 6th Ed., 587.

In the same context Judge Cooley quotes a sentence from the decision in McCulloch v. Md., supra, to the effect that it is "unfit for the judicial department to inquire what degree of taxation is the legitimate use, and what degree may amount to the abuse, of the power." (Ib., 588.)

The eminent author from whose work on Constitutional Limitations quotation has been made has considered in that treatise, and in the one on Taxation, the matter of limitations on the taxing power from practically every point of view. These general limitations, as found in both of the works mentioned, may be epitomized as follows:

1. Taxation must be for a public purpose.
2. The purpose of the tax must pertain to the district taxed.
3. The tax must be apportioned by the legislative authority with some system tending to produce equality and conformity.

Cooley's Constitutional Limitations, 598, 606, 607.
Cooley on Taxation, 3rd Ed., Vol. 1, 84, 181, 192, 225 and 254.

These three constitute, we submit, the only general limitations on the taxing power of the states, aside from those imposed by special constitutional provisions, and those re-

sulting from the federal constitution. It is obvious that Judge Cooley laid down these limitations in the light of constitutional provisions like those invoked in the case of Southern Gum Company v. Laylin, as creating the so-called "value limitation" therein laid down. Such general constitutional principles, as that political power is inherent in the people, government being established for their equal protection and benefit; that a state government is establishd to promote the common welfare; and that private property shall ever be held inviolate, are found in the constitutions of practically all the states of the Union. Surely, the learned author of the works from which we have quoted recognized these general principles, inherent in the very nature of a free government, whether expressly mentioned in the constitution or not, when he laid down his limitations upon the exercise of the taxing power.

It is therefore obvious that if the value limitation and its proper application are to be recognized as controlling the exercise of the taxing power in any respect, they must constitute particular manifestations of the third limitation above described, viz: that pertaining to the *equality of apportionment.*

Speaking along these lines, Judge Cooley says, in his work on Constitutional Limitations, at page 608:

> "These may assume the form of duties, imposts, and excises; * * * They may also assume the form of license fees, for permission to carry on particular occupations, or to enjoy special franchises. They may be specific; such as are often levied upon corporations, in reference to the amount of capital stock or to the business done, or profits earned by them. Or they may be direct; upon property, in proportion to its value, or upon some other basis of apportionment which the legislature shall regard as just, and which

shall keep in view the general idea of uniformity. * * *"

And at page 611 in the same connection:

"There are some kinds of taxes * * * that are not usually assessed according to the value of property, and some which could not be thus assessed. And there is probably no state which does not levy other taxes than those which are imposed upon property. Every burden which the state imposes upon its citizens with a view to a revenue * * * or for the support of the government machinery in any of the political divisions, is levied under the power of taxation, whether imposed under the name of a tax, or under some other designation. * * * It is not uncommon, as we have already stated, to require that corporations shall pay a certain sum annually assessed according to the amount or value of their capital stock, or some other standard; this mode being regarded by the state as most convenient and suitable for the taxation of such organizations. It is evident, therefore, that the express provisions, which are usual in state constitutions, that taxation upon property shall be according to value, do not include every species of taxation; and that all special cases like those we have here referred to are by implication excepted. * * *"

Again, at page 613:

"When the constitution provides that private property shall not be taken for public use without just compensation made therefor, it has reference to an appropriation thereof under the right of eminent domain. Taxation and eminent domain indeed rest substantially on the same foundation, as each implies the taking of private property for the public use on compensation made; but the compensation is different in the two cases. When taxation takes money for the public use, the taxpayer receives, or is supposed to receive, his just compensation in the protection which government affords to life, liberty, and property, in

the public conveniences which it provides, and in the increase in the value of possessions which comes from the use to which the government applies the money raised by the tax; and these benefits amply support the individual burden."

In his work on Taxation Judge Cooley is equally explicit:

"A person upon whom the demand is made, or whose property is taken, owes to the state a duty to do what shall be his just proportion toward the support of government, and the state is *supposed to* make adequate and full compensation, in the protection which it gives to his life, liberty and property, and in the increase to the value of his possessions, by the use to which the money contributed is applied." (Citing, *inter alia*, Railroad Company v. Commissioners, 48 O. S., 249, and Greenleaf v. Board of Review, 184 Ill., 226; both of which cases hold that it is absolutely immaterial to the validity of a special tax that the subject of the tax may have received no benefit whatever from the improvement to which the proceeds of the tax are applied.)

Cooley on Taxation, 3rd Ed., Vol. 1, p. 3.

"Everything to which the legislative power extends may be the subject of taxation, whether it be person or property, or possession, franchise or privilege, or occupation or right. Nothing but express constitutional limitation upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the legislature, in its discretion, shall at any time select it for revenue purposes (citing, inter alia, Adler v. Whitbeck, supra); and not only is the power unlimited in its reach as to subjects, but in its very nature it acknowledges no limits and may be carried even to the extent of exhaustion and destruction, thus becoming in its exercise a power to destroy." (Citing, of course, as the leading case, McCullich v. Md., supra.)

Cooley on Taxation, 3rd Ed., Vol. 1, p. 9.

"A tax on the privilege of carrying on a business or employment will commonly be imposed in the form of an excise tax on the license to pursue the employment; and this may be a specific sum, or a sum whose amount is regulated by the business done or income or profits earned. Sometimes small license fees are required, mainly for the expense of regulation; but in other cases substantial taxes are demanded, because the persons on whom they are laid would otherwise escape taxes in the main, if not entirely * * * The form of a license, though not a necessary, is a convenient form for such tax to assume, because it then becomes a condition to enter upon the business or employment and is collected without difficulty. But it is equally competent to impose and collect the tax by the usual methods."

Cooley on Taxation, 3rd Ed., Vol. 1, p. 31.

We realize that it is a presumption in us to quote these elementary principles to this court, which has dealt with them so frequently, and indeed has laid down and established practically all of them. Our justification for consuming time and space in this way lies in the fact that counsel have so egregiously failed to apprehend the true nature of the power to tax. They persist in applying to the exercise of the power to impose specific taxes upon occupations and privileges, the limitations which, undeniably, exist with respect to the making of special assessments, which constitute an exercise of a very different power. The difference between the two may be stated thus: an assessment based upon special benefits constitutes the compensation of the public for the thing which it has itself created, and in amount is limited to the benefit actually conferred; the consideration for the special assessments is the special benefit and that only. The tax, however, is imposed in the exercise of sov-

ereign power, for the purpose of defraying the expenses incident to government; the consideration for the tax resides in the benefits of government itself, and these benefits, it is conclusively presumed, are shared by all the subjects of the tax alike, and to an equal extent—at least, to an extent commensurate in each case to the exercise of the privilege taxed, the doing of the business, the acquisition of earnings or income, or, according to any other proportionate charge the legislature of the state may fix, with a view to apportioning the tax with uniformity.

We feel that we need not cite authorities other than those already mentioned, with a view to distinguishing between the power of taxation and that of assessment; but, with a view to furnishing an apt statement of the principle, we quote the following from the same author whose standard works have already been drawn upon to such an extent in this brief:

> "Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes, and governed by principles that do not apply universally. The general levy of taxes is understood to exact contributions in return for the general benefits of governing, and it promises nothing to the persons taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds * * *"
>
> Cooley on Taxation, 3rd Ed., Vol. 2, p. 1153.

It would be idle to multiply authorities by citing adjudicated cases upon the general principles which are so succinctly stated by Judge Cooley.

We do not cite this authority for the purpose of impairing the weight of the authority of the Southern Gum case, but, in connection with the obvious misinterpretation of that decision of which counsel are, we think, guilty, we revert to these elementary principles for the purpose of showing the fundamentally erroneous viewpoint from which counsel have discussed the main question, and have misinterpreted that decision itself. We submit, therefore, that, on the face of the decision in Southern Gum Co. v. Laylin, and in the light of the general principles to which we have referred, a *tax* imposed upon a privilege as a subject of taxation cannot be escaped by an individual possessor of the privilege—one engaged in the privileged occupation—on the ground that the amount apportioned to him exceeds the value of any special advantage which he may have by reason of his possession of that privilege, or even on the ground that, in the pursuit of the supposed privileged occupation, he is becoming insolvent.

As a final word upon this branch of the case we would suggest to the court the true distinction between property taxation and privilege taxation. Counsel, in discussing the district court's reliance upon the State Railroad Tax Cases, 92 U. S., 575, have made a distinction between the two, based on the Southern Gum case, asserting that the so-called "value limitation" may not apply to property taxation, but certainly does apply to the taxation of privileges. The invalidity of this distinction has already been commented upon. It is the more apparent, however, from the language of Mr. Justice Day, in the opinion of this court in Flint v. Stone-Tracy Co., 220 U. S., 108, at page 151:

> "The tax under consideration, as we have construed the statute, may be described as an excise upon the

> particular privilege of doing business in a corporate capacity, i. e., with the advantages which arise from corporate or quasi corporate organization; * * * As was said in the Thomas case, 192 U. S., 363, the requirement to pay such taxes involves the exercise of privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable."

From this it follows that the appellants cannot assert the absolute and unavoidable taking of their property by reason of the law of Ohio. All that would be taken from them by the tax in question would be that upon which the tax is laid, viz: the privilege of operating the railroads which they severally own. Being conceded to be a privilege, this thing may be taken by the state, just as it may be withheld, in the first instance, without subjecting the state to the complaint that private *property* is being taken without due process.

> *In any event, the rule of apportionment of the tax, according to gross earnings, is a proper one, it not being required that apportionment be according to net earnings; whereas, the contention of appellants resolves itself into the statement that no privilege tax may be apportioned otherwise than according to net earnings.*

We now notice a second fundamental fallacy involved in counsel's interpretation of the Southern Gum case. They would have it that, although the present tax may be constitutional throughout the general field of its application, it cannot be exacted from the appellants because they, as individuals, are not able to reap profits from the operation of their respective roads; and because, indeed, the one appellant, The Marietta, Columbus & Cleveland Railroad Company, is unable to meet its operating expenses. We

submit that this position necessarily resolves itself into the contention that an excise tax on the privilege of engaging in a business can be apportioned only according to net earnings, as distinguished from gross earnings; or at least into the proposition that where there are no net earnings the tax cannot be collected. Indeed, the true position of the appellants is even more radical than this, viz: that the tax cannot be collected unless there are net earnings in excess of the profits ordinarily produced by the conduct of business not privileged.

We submit, further, that if a tax cannot be collected from an individual engaged in a privileged business, who is unable to acquire therefrom net profits, or some unusual net profits, as the case may be, then, it must follow that the tax must be apportioned in the first instance on the basis of net profits; it being a distinction without a difference to insist that a tax may be apportioned upon one basis, but must be collected upon another basis.

To be sure, counsel have not used the exact phraseology which we have employed. As they put it, their contention is that the privilege of carrying on a business from which a particular individual is unable to produce the requisite profits is a valueless one, so that a tax on the privilege, imposed under the so-called "value limitation," cannot be collected from such an individual.

But, in the last analysis, the contention amounts to the statement which we have made. Accordingly, if it should appear that the authorities have sustained occupation or privilege taxes apportioned according to gross income or earnings, as distinguished from net income or earnings, as against this very objection, this contention of appellants' counsel falls to the ground.

> "Where the tax is to be measured by income, this must be understood as gross income, and it will be chargeable *even though there be no profits* * * * Income, when not qualified in a tax law, may be held to mean that which comes in or is received from any service, business or investment of capital without reference to outgoing expenditures; and it thus differs from net income, net earnings or profits, which mean the gain, with both receipts and expenditures taken into account."
>
> Cooley on Taxation, 3rd Ed., Vol. 1, p. 684.

The numerous instances in which this court and the Ohio Supreme Court have sustained excise taxes measured by gross receipts or gross earnings, as against constitutional objections, need but to be recalled. Practically all the excise tax cases which we have cited, and shall cite in the brief, involved laws of that character, and we do not feel obliged to cite the cases again in this connection. Let Judge Cooley's text, above cited, be read in connection with his paragraph quoted by the District Court at page 26 of the transcript in Case No. 642. In the one paragraph the learned author states that a tax measured by income is to be charged though there be no profits; in the other paragraph he states that absolute equality in taxation being an unattainable ideal, individual and incidental hardships are not to be permitted to defeat the operation of a tax law, but must be submitted to.

To these principles we need add only the one quoted from Mr. Justice Day's opinion in Flint v. Stone-Tracy Co., supra, to the effect that a privilege tax lacks the element of absolute and unavoidable demand, and exacts from the subject of the tax the election merely of continuing to enjoy the privilege under the burden of the tax, on

the one hand, or relinquishing that enjoyment and escaping the payment of the tax, upon the other hand. When these principles are placed in their proper relation, a rule, clearly established by the authorities on which we rely, results as follows: a state may apportion a privilege tax and thus "measure the value" of the prilivege taxed, by the gross earnings produced by the enjoyment of the privilege; such a tax must be charged and collected from all those subject thereto, even though there be no profits—no extraordinary or unusual net earnings; the fact that some individuals, to whom the tax is apportioned, as the possessors of "valuable privileges," have no profits, and are able to produce none by the enjoyment of their privileges, does not defeat the tax, on the one hand; nor can such individuals escape its payment, on the other hand.

Nor is there anything inconsistent between the idea of a privilege tax apportioned according to gross earnings, and thus necessarily laying a hardship upon those possessors of the privilege who are unsuccessful in the financial sense, and anything decided in Southern Gum Company v. Laylin, supra, as we have already pointed out. In that decision itself the Ohio court cites, with approval, cases involving tax laws based upon privileges and apportioned according to gross earnings. The decision also cites, with approval, cases involving excise taxes assessed specifically and in bulk—and, of course, without reference to the profitableness of the taxed employment. The case itself presents an instance of a franchise tax which, though levied under the "value limitation" and upon a privilege of the state's own creation, was apportioned according to a factor which did not take into account the profitableness or unprofitableness of a particular enterprise, managed

and conducted through the enjoyment of that privilege—a tax which, by express provision of the law itself, was to be collected from subjects of taxation even after they had ceased to make active use of the privilege taxed, and under circumstances sufficient to indicate the clear intention of the legislature not to take into account the element of profit.

The present field of thought is a tempting one, but we forbear further discussion and other citation of authorities. Appellants seek to have this court determine that the "value" of the privilege of being a public utility—nay, the very existence of the privilege itself, is dependent upon the derivation of profit from its careful use. The authorities cited in this immediate connection, as well as others which have been and will be cited in other portions of this brief, dispose, we think, of this contention in its entirety.

*The Significance of the Fact that the Tax is an Excise.*

The argument made by counsel has necessitated examination of the nature of the privilege which is the *subject* of the tax. We have already seen that in the attention which counsel have given to the privilege as such they have overlooked the fundamental nature of the taxing power as an attribute of sovereignty. Permit us also to call attention to the *means* by which that power is exercised in the case of the present tax as distinguished from the *object* upon which it is exercised.

The law involved in the cases at bar describes the *object* of the tax as the "privilege of carrying on intrastate business," as pertaining to a "public utility." We have attempted an analysis of that privilege into its component

elements; we have shown the distinction between such a privilege as a subject of taxation and a special benefit conferred by the laws of the state as such; we have discussed generally the application or rather the non-application of the "value limitation" imposed by the Constitution of Ohio as interpreted in Southern Gum Co. v. Laylin, to the taxation of such privileges, having regard to the fundamental nature of the taxing power. But we have not as yet adverted to the significance of the *kind of tax* which is imposed by the law.

We have, however, shown that in the Southern Gum Company decision a clear distinction is drawn between the taxation of privileges and franchises as such and the imposition of excise taxes which, says the court, "may *also* be imposed" upon subjects of taxation which might be otherwise taxed.

The law in the cases at bar designates the exaction as "a sum in the nature of an excise tax." It is our present purpose to show the significance of this designation as bearing upon the issues involved in the cases at bar. This court while frequently called upon to consider the nature of excise taxes as such has never, so far as we are informed, formulated a technical definition of the term itself. Thus, in the case of Flint v. Stone Tracey Co., supra, Mr. Justice Day contented himself with quoting Judge Cooley's definition of the term as follows:

> "Taxes laid upon the manufacture, sale or consumption of commodities, within the country, upon license to pursue certain occupations and upon corporate privileges." (Cooley on Taxation, 7th Ed., 680, cited in Flint v. Stone-Tracey Co., supra, 151.)

At the same time Mr. Justice Day said that:

> "It is unnecessary to enter upon an extended consideration of the technical meaning of the term 'excise'";

it being sufficient for his purpose at the time to determine that the federal corporation income tax was an excise tax. This decision is we believe typical of the other decisions of the court upon the subject, in which the power of congress to levy "duties, imposts and excises" has been generally construed, as in Thomas v. U. S., 192 U. S., 363, as language "used comprehensively to cover customs and excise duties imposed upon importation, consumption, manufacture and sale of certain commodities and privileges, particularly business transactions, functions, occupations and the like."

But for our present purpose it seems necessary to consider the exact and technical meaning of the term "excise." We think that meaning is apparent from the derivative itself. Lexicographers seem in doubt as to whether or not the derivation is from the Latin "excisus," the perfect participle of the verb "excidere," meaning to "cut off" or to "cut out" or is a corruption of a middle Dutch or Teutonic word meaning simple taxes. It seems to us, however, that the word "excise" as a species of tax must necessarily mean something less comprehensive than the word "tax" itself, and that therefore the Latin derivation is to be preferred as indicating a species rather than a genus. (See Century Dictionary.)

The lexicon which we have cited gives a quotation which we think indicates the exact and technical meaning of the term—employs it in its definitive sense instead of at-

tempting merely to describe it by enumerating examples of its use, which is as follows:

> "But the success of internal or inland duties on articles of consumption—or *excises* as they were termed, from the *excision* of a part of the article taxed—in Holland had brought prominently into notice the advantages of taxes of this description.
>
> S. Dowell, Taxes in England, II, 8."

And again the following quotation is made, similar in character:

> "An *excise* is based on no rule of apportionment or equality whatever, but is a fixed, absolute, and direct charge laid on merchandise, products or commodities without any regard to the amount of property belonging to those on whom it may fall, or to any supposed relation between money expended for a public object and a special benefit occasioned to those to whom the charge is paid."
>
> Blackwell on Tax Titles, (4th ed.), 1 n. 1.

The use of the term in question in the above quotations discloses that the distinguishing attribute of the excise tax is that it is laid as a charge upon the thing taxed irrespective of all other conditions. It is an exaction *cut out*, as it were, of the price of the commodity or the privilege before the commodity becomes the subject of use or consumption or before the privilege is exercised or employed; when imposed upon a business or occupation, it is a fixed charge on that business or occupation just the same as the cost of materials, the wages of labor, the expense of necessary equipment, etc.

The theory of excise taxation is, of course, that the burden does not rest upon the primary subject of the tax but is to be shifted to the consumers of the commodity or the

public dealing with the possessors of the privilege or those engaged in the excised occupation. Hence, such a tax is an *indirect* one, so termed by the federal constitution itself. Now, it is the complaint of the appellants that they are unable to shift the burden of the tax by reason, not of a condition which grows out of the tax law itself, but by reason of the facts averred in paragraph 23 of the brief, viz., the alleged oppressive application of the two-cent passenger fare law of the State of Ohio to the business of the respective appellants. We are thus confronted with this situation: The appellants allege that they cannot shift the burden of an indirect tax because of the effect of a police regulation of the state; *therefore they choose to attack the tax law.*

We submit that appellants have no election as to which of two laws alleged to be oppressive in their joint operation, they will attack. Let their ultimate conclusion for the moment be accepted, viz., that the joint effect of the rate legislation and the tax legislation of Ohio is oppressive as to them, so that they may have just cause for complaint on some constitutional ground. May they choose their point of attack? We think they have themselves cited authorities in their brief negativing any such idea. We refer in particular to the Missouri Rate Case, 230 U. S., 474-508, cited at page 50 of appellants' brief. As counsel themselves say, this case settles the proposition that,

> "The constitutional guaranties protect an individual railroad * * against *rate* legislation confiscatory as to it, and that such legislation is not rendered thereby invalid with respect to other railroads."

This court has more than once distinguished between the extent of the taxing power of the state and the extent of its regulatory power. We need not cite authorities to this effect. Suffice it to state that the taxing power is the paramount one; so that if a uniform excise is levied upon public utilities the burden of which cannot be shifted by a particular utility on account of the alleged oppressive effect of rate legislation of the state upon it and its business the remedy of such utility is, not to seek exemption from the tax law, but to seek relief from the rate law. This consideration of the fundamental nature of an excise as distinguished from other modes of taxation leads us again to cite in this connection the already quoted language of Mr. Justice Day in Flint v. Stone-Tracey Co., viz., "If business is not done in the manner described in the statute no tax is payable."

This characteristic of the excise deprives it of any seeming feature of hardship; and though it must be apportioned with equality in deference to Judge Cooley's third general limitation above described, yet when so apportioned it is inconceivable that it can constitute *a burden upon property* so as to deprive the individual or property or to violate the right of private property in any way or manner whatsoever, for the sufficient reason that escape from the tax is always possible by the simple expedient of yielding up the privilege, and "the element of absolute and unavoidable demand is lacking," as Mr. Justice Day says in the case cited. And if (to bring the principle down to its application to the cases at bar) the respective businesses of the Marietta, Columbus and Cleveland Railroad Company and the Ohio River and Western Railroad Company are in such a deplorable condition it certainly ought not to be

a hardship for these companies to discontinue the operation of their respective railroads as they have a right to do, so that the capital invested in their operation may be liberated for investment in the "legitimate high grade investments at all times readily available on the market" referred to in the bills.

*A Proper Understanding of the Decision in Southern Gum Company v. Laylin Eliminates the First Federal Question Sought to be Made.*

The theory of appellants' brief with respect to the first point leads up to the conclusion expressed in paragraph 25 of the bills as follows:

> "Said excise tax, and every part thereof, exceeds the reasonable annual value of the privilege of carrying on plaintiff's intrastate business * *. Said tax is therefore, invalid and void, and in violation of the constitution of Ohio, and particularly the preamble thereof, and section 2 and 19 of the Bill of Rights thereof, and in violation of Article 2 of the Ordinance of 1787, and in violation of the Fourteenth Amendment of the Constitution of the United States." (Quoted from page 6 of transcript in No. 643.)

Obviously this conclusion is based entirely upon appellants' interpretation of the Southern Gum Company decision. We have shown, we think, that the "value limitation" of the Southern Gum Company decision was intended by the Supreme Court of Ohio to be applied only to the taxation of state created franchises and privileges as such, and was not only not intended to apply to any type of excise taxation in the exact sense, such as that exemplified in the present tax, but such taxes were expressly distinguished from those subject to the "value limitation."

We have already shown that whatever be the *extent* of the "value limitation" spoken of in Southern Gum Company case the method of its application is confined to a consideration of the effect of the tax throughout the entire field of its operation; every inference from the language used in the decision (as well as general principles well established by other authorities) negativing the view that the limitations might be so applied as to excuse individuals under peculiar circumstances from the payment of a tax.

It follows, therefore, that the Ohio Constitution has not been interpreted by the Ohio court in the manner in which appellants have supposed that it has been interpreted. We would submit also that if any interpretation of the Ohio Constitution on the point involved has been made by the Ohio court it has been the opposite of that contended for by appellants.

Now if we understand the theory of the bills and the argument embodied in the brief, it is that because the Ohio Supreme Court, has interpreted the Constitution of Ohio in a certain way, and because that interpretation would render the tax upon appellants violative of the *state constitution*, therefore, being so, the exaction of the tax constitutes a deprivation of property without due process in violation of the Fourteenth Amendment, the only provision of the federal constitution relied upon.

In other words, reliance upon the Fourteenth Amendment is predicated upon the interpretation of the Ohio Constitution by the Supreme Court of that state, so that if it be shown that no interpretation such as that contended for has been given to the Ohio Constitution, then the federal question would disappear.

Therefore, we submit that, it having been demonstrated that the Supreme Court of Ohio has not so interpreted the Ohio Constitution as to enable the appellants to escape the tax as a taking of property unauthorised by that constitution, upon that showing the federal question sought to be made out of Southern Gum Company v. Laylin is at once eliminated.

Counsel for appellants nowhere disclose any intention to claim under the Fourteenth Amendment independently of the decision of the Ohio court in Southern Gum Company v. Laylin, but if there be any disposition so to rely independently upon that provision of the federal constitution we submit that the authority of McCray v. U. S., 195 U. S., 27, is sufficient to defeat any such reliance. In that case the present Chief Justice disposed of a contention that the rate of excise tax imposed by certain federal legislation upon the commodity known as oleomargarine was so excessive as to avoid the tax, in the following manner:

> "The proposition that where a tax is imposed which is within the grant of powers, and which does not conflict with any express constitutional limitation, the courts may hold the tax to be void because it is deemed that the tax is too high, is absolutely disposed of by the opinions in the cases hitherto cited (being Knowlton v. Moore, 178 U. S., 41; the License Tax Cases, 5th Wallace, 463, 471; Pac. Ins. Co. v. Soule, 7 Wallace. 433; Austin v. Boston, 7 Wallace, 694, 699; Veazie Bank v. Fenno, supra; Spence v. Merchant, 125 U S., 355; Treat v. White, 181 U. S., 264, 268; Patton v. Brady, 184 U. S., 608, 623) and which expressly hold, and we repeat again the language of one of the cases (Spence v. Merchant) that a judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised absolutely

upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members were elected."

And in the same opinion, discussing whatever difference might be said to exist between the attitude of the federal courts toward the legislation of congress in this particular and their attitude toward state legislation, the present Chief Justice said:

> "Of course where a state law is assailed as repugnant to the constitution of the United States, and on its face such act was seemingly within the power of the state to adopt, but its necessary effect and operation is to usurp a power granted by the constitution to the government of the United States, it must follow, from the paramount nature of the constitution of the United States, that the act is void. In such case the result of the test of necessary operation and effect is to demonstrate the want of power, because of the controlling nature of the limitation imposed by the constitution of the United States on the states."

We presume it may now be regarded as perfectly well settled that the requirement of due process of law imposed by the Fourteenth Amendment to the Federal Constitution in respect to its application to the tax limitation statutes is met by a law which specifies the three general limitations on the taxing power deduced by Judge Cooley from the decisions of this court, viz: That the purpose of the tax shall be a public one and shall pertain to the district taxed; and that the apportionment thereof shall be approximately uniform. Kelly v. Pittsburgh, 104 U. S., 78. Cooley on Taxation, 3rd Ed., page 55 et seq., and cases cited. The only additional requirement is that in the process of assessment the taxpayer must have notice and an opportunity to be heard.

By an examination of "Appendix A" the court will readily observe that no complaint can be lodged against the present law in that particular.

B. The Claim that Equal Protection of the Laws of the State is Denied Because of the Alleged Failure of the Present Tax Law to Include all Public Utilities.

We have already enumerated the various public utilities subject to the payment of the excise tax under the law of Ohio. This is on its face almost sufficient to dispose of this argument.

We are, however, aware that there are public utilities, sometimes recognized as such, which are not subject to taxation under this law; for example, the State of Ohio imposes no occupation tax upon elevator companies or upon the business of warehousing, although this business has been held, in the leading case of Munn v. Illinois, 94 U. S., 113, to be one charged with a public interest. It is possible that diligent search of the authorities will disclose that courts have decided that still other occupations are charged with a public interest; thus, the occupation of maintaining a public bridge or a public highway for toll or hire might be so classed. Here, however, it is to be noted that in all probability, as a matter of fact, there are no public bridges, being operated for hire in this state, excepting such as are interstate bridges; so that the owners thereof could not be taxed upon the business; and that there are very few, if any, toll roads remaining in the State of Ohio. Again, stock yards have been treated in some states as public utilities, but it is to be doubted if

there are any extensive privately owned stock yards in the State of Ohio. It is supposed that a very convincing argument might be constructed to the effect that either the miners or retailers of coal are engaged in a business charged with a public interest, although we are not aware that any effort has ever been made to treat either of these occupations as such. We fear that here the argument may resolve itself into an effort of the imagination. We submit, with confidence, that the following propositions of law are perfectly established:

1. The state may, without denying the equal protection of the laws, and without violating its own constittuional provisions, similar to those of the Fourteenth Amendment to the Federal Constitution, impose separate privilege taxes upon distinct occupations charged with a public interest.

2. Even if it be assumed that when the state attempts to tax public utilities *as such* it must tax all occupations which are in fact public utilities, the legislative power of the state is first exercised in the determination of this question of fact, namely: as to what occupations are, with respect to the citizenship of that state, charged with a public interest. This legislative act will not be disturbed by the courts unless its determination is clearly and unmistakably arbitrary.

A few leading decisions of this court are alone sufficient to establish both of these propositions.

In the Kentucky Railroad Tax Cases, 115 U. S., 321, the Supreme Court sustained, as not inconsistent with the equal protection clause of the Fourteenth Amendment, a Kentucky statute providing for the assessment of railroad property for purposes of taxation in a mode different from

that prescribed as to ordinary real estate, or as to the property of corporations chartered for other puposes, such as bridge, mining, street railway, manufacturing, gas and water companies. In the opinion in that case it was said that,

> "The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of *each class*, so that the law shall operate equally and uniformly upon all persons in similar instances. There is no objection therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained."

It is here to be remarked, parenthetically, that the very law involved in the case at bar provides for the assessment of the physical property of public utilities by a method different from that applied to the property of other corporations and persons. Formerly, this method obtained only as to railroad companies, express companies, telegraph companies and telephone companies. Only recently has it been extended to other public utilities. We respectfully submit that the decision just cited is authority for the proposition that the legislature of the State of Ohio is not restrained by the Fourteenth Amendment to the Constitution of the United States or by any similar provisions in the Constitution of Ohio, from imposing particular rules of taxation or particular privilege taxes upon one or more public utilities, to the exclusion of other occupations or corporations, which might be so classed.

We suppose it will be argued that because the legislature has attempted to make its rule applicable to all public utilities, therefore, its legislation will be void unless it affects

all which are public utilities in fact. Here it is sufficient, we think, merely to remark that the phrase "public utility," as used in the law, is definitive and not descriptive; that is to say, it is an artificial term applied to a class which the law creates, and not descriptive of a class which exists independently of the law. But even if the latter were true, we still think that the case last cited, together with those which we are about to cite, destroys the force of the possible argument here.

In Bell's Gap Railroad Company v. Pennsylvania, 134 U. S., 232, the Supreme Court held valid, under the Fourteenth Amendment, a statute of Pennsylvania subjecting the securities issued by corporations to a higher rate of taxation than was imposed on other moneyed securities.

The following language occurs in the opinion:

> "All corporate securities are subject to the same regulation. The provision in the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all * * * *It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products*; * * * All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. * * * They must be decided as they arise. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the states to adopt an iron rule of equal taxation. If that were its

> proper construction * * * it would render nugatory those discriminations which the best interests of society require * * * and which every state, in one form or another, deems it expedient to adopt."

The italicized portion of the above quotation applies to and disposes of every question of discrimination raised by the bills.

In Home Insurance Company v. New York, 134 U. S., 594, a law taxing corporate franchises and businesses was held valid as against this attack. In the opinion of the court it was said that

> "The amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be attained by it. * * * Under the statute of New York all corporations, joint stock companies and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the *same class*.

In Connolly v. Union Sewer Pipe Company, 184 U. S., 540, the following language was used:

> "A tax may be imposed only upon certain callings and trades, for when the state exerts its power to tax it is not bound to tax all pursuits of all property that may be legitimately taxed for government purposes. It would be an intolerable burden if a state could not tax any property or calling unless, at the same time, it taxed all property or all callings. Its discretion in such matters is very great, and should

be exercised solely with reference to the general welfare as involved in the necessity of taxation for the support of the state. A state may, in its wisdom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States."

In Magoun v. Ill. Trust & Sav. Bank, 170 U. S., 283, a state's right to classify objects of legislation for the purpose of levying a graduated inheritance tax was recognized and held not impaired by the provisions of the Fourteenth Amendment.

In American Sugar Refining Co. v. Louisiana, 179 U. S., 89, a license tax on the business of refining sugar and molasses, from which planters and farmers who ground and refined their own sugar and molasses were exempted, was held not unconstitutional.

In W. W. Cargill Co. vs. Minnesota, 180 U. S., 452, a statute requiring a license to operate a grain warehouse, located on the right of way of a railroad, and not requiring such a license as to a similar warehouse, not located on any right of way, was sustained as against this objection.

In Armour Packing Company v. Lacy, 200 U. S., 226, a state law imposing a license tax on meat-packing houses was held not to deny equal protection of the laws to those engaged in such business because a like tax was not imposed on persons engaged in packing articles of food other than meat.

In Southwestern Oil Company v. Texas, 217 U. S., 114, an occupation tax on wholesale dealers in oils was sustained nothwithstanding the fact that wholesale dealers in

other articles of merchandise were not so taxed. The following language is used in the opinion:

> "It is not questioned that the state may classify occupations for purposes of taxation. In its discretion it may tax all or it may tax one or more, taking care to accord to all in the same class equality of rights."

In Brown-Foreman Company vs. Kentucky, 217 U. S., 563, a license or occupation tax imposed upon the business of compounding, rectifying, adulterating or blending distilled spirits is held not to deny the equal protection of the law, in spite of the fact that no such tax was exacted from distillers who neither rectified, compounded, adulterated nor blended their products, nor from rectifiers or blenders in other states and counties who blended in the state untaxed, rectified or blended spirits in direct competition with the spirits of local rectifiers or blenders.

The making, in the case last cited, of the contention that all are within the same class, within the protection of the Fourteenth Amendment, who compete with each other in any way, and its rejection by this court, is a point to which we desire to call particular attention. One theory of the bills, in the cases at bar, seems to be that a special or different tax cannot, under the Fourteenth Amendment and corresponding provisions of the Ohio Constitution, be levied against a business or occupation which is carried on in part by money borrowed in the money markets, in competition with other enterprises which are not taxed. The language of the bills here is as follows:

> "The public utilities upon which said excise tax is imposed by said act must compete and continue to compete with said excluded classes of public utilities in the money markets for the securing of funds neces-

sary to the establishment, betterment and maintenance of their respective lines of business, and by reason of the arbitrary and discriminatory classification aforesaid * * * those utilities subject thereto, including railroad companies, are placed in a great and constant disadvantage in perfecting and maintaining their several financial arrangements, and will continue to be."

The foregoing language appears in paragraph 26 of the bills and is followed by paragraph 27, which states the conclusion of law to the general effect that by reason of the premises the act is invalid as special legislation and as denying the equal protection of the laws to persons within the territorial jurisdiction of the state.

Similar language appears in paragraph 28 of the bills.

We suppose that the proposition upon which these averments are founded would be summed up in language something like the following:

All subjects of excise taxation are within the same class, which borrow money in the same money market.

This novel proposition, if true, would have induced this court to a different conclusion in each of the above cited cases. This is exactly true of the case of Bell's Gap Railroad v. Pennsylvania, supra; here, the tax was levied directly upon bonds and other securities issued by a corporation. True, it was also a tax upon all moneyed securities of whatever nature; but the general tax, while at the same rate as the corporation tax, was levied upon the actual value of the securities assessed while the corporation tax was levied upon the par or nominal value thereof. Furthermore, each corporation was obliged to furnish the auditor general of the state with a statement of the par value of its securities, owned by residents of Pennsylvania.

The original plaintiff in the case was one of the corporations itself, and complained of the assessment that the statute under which it was made violated the Fourteenth Amendment, in that it denied to the plaintiff the equal protection of the law. Clearly, then, the basis of equality, which the Bell's Gap Railroad Company alleged had been violated in its case, was the borrowing power. Its argument resolved itself into the proposition that because corporations and private individuals were in the same class as borrowers of money, a tax law which discriminated between these two sub-classes of borrowers was a denial of the equal protection of the law.

We submit, therefore, that the decision in Bell's Gap Railroad Company v. Pennsylvania disposes of the premise upon which much of the argument of the plaintiffs, embodied in their bills, rests, namely, that an excise tax law must apply to and equally affect all those who borrow money in the same market. The need of such express authority may well be questioned; all business is transacted on borrowed money; and if the state is obliged, when it enacts an occupation tax, to make the same apply to all occupations which compete in the money market for funds with which to carry on their activities, then, a state could levy but one occupation tax, namely, one upon the occupation of being engaged in business.

Indeed, this argument seems to have been abandoned by appellants' counsel in this court, as no intimation of it is found in their brief.

But it is further contended that the tax is upon the business or occupation of being a public utility—not upon that of being a railroad company—and that because some public utilities, alleged to be such in fact, are not included in the

catalogue of companies defined as such, the law is unconstitutional.

Now, in what search we have made on this point, we have not found any judicial definition of the term "public utility;" it is a term which has come into use in recent years, but we are not aware that it has any definite and restricted meaning. We have failed to find any adjudicated case in which any court has attempted to enumerate the various occupations or enterprises which constitute public utilities. Heretofore, in this brief, we have assumed that the phrase means, in its most exact application, a business or enterprise which so intimately affects the public generally as to be charged with a public interest, or one which holds itself out to the public generally as a servant of all who may desire its services. If this be the sense in which the term is used in the statute, then, it is true, perhaps, that the enumeration of utilities in Section 40 of the Act is not exhaustive, although very few, if any, such occupations as have just been described will be found, upon reflection, to have been omitted therefrom.

But we repeat our contention that no intention is manifest on the face of the law to use the phrase "public utility" in such a generic and descriptive sense; rather, it is used in a definitive sense and fully and accurately defined in the statute itself. We refer to Section 39 of the Act, the first of those above quoted, which provides as follows:

> "The term 'public utility' as used in this act means and embraces each corporation, company, firm, individual and association, and lessees, trustees or receivers, elected or appointed by any authority whatsoever and herein referred to as express company, etc. * * * and such term 'public utility' shall include any

plant or property owned or operated by any such companies, corporations, firms, individuals or associations."

Here, then, is an artificial or original meaning given to the term "public utility." The tax is not laid upon public utilities as such, but upon the "public utilities" defined in the statute. The difference between the meaning of the statute as the draftsman of the bills evidently conceived it, and the actual meaning as disclosed by the words employed is obvious.

But even if it be conceded that the exact meaning of the term "public utility" is to be ascertained from sources other than the face of the statute itself, there is still no warrant for giving to the term "public utility" the meaning which seems to be assumed as the correct one by the pleader.

On the same day on which the General Assembly passed the tax law of 1911 it enacted another law, found in 102 O. L., 549, entitled: "An Act changing the name of the railroad commission of Ohio to that of the public service commission of Ohio, defining the powers and duties of the latter commission with respect to public utilities, etc. * * *" Section 4 of that Act provides in part:

"The term 'public utility' as used in this act shall mean and include every corporation, company, co-partnership, person or association, and lessees, trustees or receivers, *defined in the next preceding section* (with certain exceptions)."

The "corporations, companies, etc., defined in the next preceding section" are exactly *the same companies enumerated in section 40 of the tax commission act.*

Now, without quoting further from the public service commission act of 1911, suffice it to say that that act vested in such commission certain regulatory powers over and with respect to certain businesses and occupations therein referred to as "public utilities." In brief, then, the state treats as public utilities, for purposes of regulation, precisely the same occupations as those it treats as such for purposes of privilege taxation. The General Assembly is at least consistent. We think it is perfectly clear, then, that if the meaning of the phrase "public utility" is to be determined and ascertained otherwise than from an examination of the definitive section of the tax commission act itself, the corresponding section or sections of the public service commission act are conclusive of the matter. The definitions of the two acts being substantially identical, it must be conclusively assumed that in using the phrase "public utility" the General Assembly did not intend to refer to a class or genus of occupations which has existence outside of its own definitions, but only to a class or genus of occupations created by its own fiat.

This being the case, then, all of the above cited authorities are perfectly applicable upon all points of classification. The legislature has simply imposed a privilege or occupation excise tax upon a number of enumerated businesses, which it had the perfect right to do, grouping them together under the artificial term "public utilities."

Even if, however, the court should take the view that the term "public utility" has a definite meaning aside from that given to it in the statutes, we again submit that the occupation taxed is not that of being a public utility, but that of being a railroad company, pipe line company, a waterworks company, etc. We shall more fully discuss this proposition in another connection.

We think we have said enough to demonstrate that by an unbroken line of decisions of the Supreme Court of the United States it is now settled that the Fourteenth Amendment to the Constitution of the United States which restrains the several states from denying to persons within their respective judisdictions the equal protection of the law, does not prevent any state from singling out specific occupations and imposing excise or occupation taxes upon them regardless of conditions of competition and the like, from the existence of which it might be argued that such occupations were in the same category with respect to taxation as others not subject to such laws.

The foregoing authorities, then, dispose of the purely federal question here raised. The Fourteenth Amendment to the Constitution of the United States is not, however, the sole constitutional limitation involved at this point in the bills. Sections 2 and 19 of the Bill of Rights of the Ohio Constitution and the preamble thereof are also relied upon. These sections are quoted in appellants' brief at pages 16 and 17 thereof.

Section 19 seems to have been erroneously cited here. The inviolability of private property is not concerned in this suit unless the contentions of the plaintiffs are first established. That is to say, this section of the Constitution certainly does not restrain the taxing power of the state; it merely restrains the state from taking private property except by the exercise of the power of taxation or for some other public purpose.

As to the preamble and Section 2 of the Bill of Rights, it is submitted that in so far as they bear upon the present question they mean, practically, the same thing, namely, that there shall be no special legislation and that all laws

shall have an equal operation on subjects of legislation within the same category. In this respect they do not differ in meaning from the Fourteenth Amendment to the Constitution of the United States. Indeed, it was held in State ex rel. v. Ferris, 53 O. S., 314, per Burket, J., page 341, that,

> "As to the first section of the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall 'deny to any person within its jurisdiction the equal protection of its laws,' it is sufficient to say, that the provisions of this section of the Federal Constitution, as to this question, are not broader than the second section of our bill of rights, and that therefore a statute upon this subject, authorized by our bill of rights, would not be in conflict with this section of the Constitution of the United States."

So that the Supreme Court of the State of Ohio has conclusively—so far as this court is concerned—decided that the preamble and the second section of the Bill of Rights of the Ohio Constitution mean practically the same thing as is meant by that provision of the Fourteenth Amendment to the Federal Constitution which prescribes that "no state shall deny to persons within its jurisdiction the equal protection of the laws."

From this it follows that the federal decisions above cited are applicable both to the Ohio Constitution and to the Federal Constitution. We submit that they effectually dispose of the averments of paragraphs 26 and 27 of both bills.

C. The Alleged Improper Discrimination in Rates of Taxation Among Different Public Utilities to Which the Act Relates.

Much of the above discussion is applicable to this contention, as well as to that to which it primarily relates. That is to say, the reasoning and authorities which we have submitted to the court on the proposition that the general classification which the act makes does not render it unconstitutional are equally in point with respect to the claim that the legislature of Ohio could not, without violating the same constitutional limitations, impose a different rate of excise taxation upon railroads and pipe line companies from that imposed upon street and inter urban railroads or natural gas or waterworks companies, as the case may be.

In this connection, however, and with a view to making clear the ground upon which we assert that the term "public utility" as used throughout the Ohio tax law of 1911 is an artificial one, we call attention to the legislative history abstracted in "Appendix B" of this brief. Let the court observe the act of 1896 (92 O. L., 79) found therein. This act imposed an excise tax which was the parent of the tax involved in this case upon certain enumerated businesses, and defined the various businesses subject to the tax, but did not give to them as a class any such name as "public utilities" or any other like term. As it will be further apparent from "Appendix B" this act of 1896 continued in force unamended until April 15, 1902 (95 O. L., 136); at that time it was virtually re-enacted and certain other businesses by name and definition were made sub-

ject to the tax. No other general term, however, was coined by the legislature at that time to refer to these companies or businesses. This was the act known as the "Cole law" which counsel are perfectly willing to use in their argument, beginning at page 67 of their brief in an effort to show that the present law is unconstitutional because it attempts in part to obtain a result at which the former law aimed, and which may not be regarded as an unconstitutional one.

We question the propriety of using the former act in this manner, and shall hereafter comment more at length upon that phase of the cases. Surely, however, the former act, and its predecessor, may be used in showing the manner in which the term "public utilities" crept into the law. The act of 1910, abstracted in Appendix "B," was popularly known as the "Langdon law." This law was a comprehensive enactment, designed to bring together and vest in the tax commission of Ohio a large number of theretofore unrelated administrative powers having to do with taxation. This was its principal purpose; a subsidiary purpose was to extend to all companies, formerly taxed under the Cole law, to which we have just referred, the principles somewhat modified of the "Nichols law," to which reference is made in both briefs, and under which, prior to that time, express, telegraph and telephone companies had been taxed upon the unit value of their properties, as going concerns, apportioned to the state and to the taxing districts therein, according to certain hard and fast formulas. In a word, the act of 1910, as one of its principal purposes, embodied an effort to make subject to the qualified Nichols law valuation, so-called, all of the "companies" formerly taxed on the excise basis of the Cole

law. Now, in order to do that, without using some general term to describe all of these companies, it would have been necessary for the legislature to repeat in every section dealing with the reports, to be made by them, and other like matters, the entire catalogue of businesses or occupations originally found in the Cole law. Considerations of convenience dictated the choice of such a general descriptive term, and the phrase "public utilities" was hit upon for this purpose. This legislative history clearly discloses the purpose of the legislature in using the term in question. It was not proposed to create a class; it was not proposed to use a term which had any original and independent meaning whatever; the sole purpose of the legislature in employing the phrase in question was to find a convenient name, which should apply to and describe all of the subjects of excise taxation.

Now, much of the argument of counsel upon this point is based upon the assumption that, because the legislature used a name which should be understood, for the purposes of the act, to apply to all of the subjects of excise taxation, it must be deemed to have intended one of two things, which are:

1. To refer to a natural class of objects, the membership of which might be ascertained by having regard to some text writer's definition of a term like that which they had used.

2. To create a uniform class of objects which, in the mind of the legislature and in actuality, were in the same category, for all purposes connected with excise taxation.

We have just finished discussing the first contention, and we think we have sufficiently demonstrated that the legislature could not have meant to use the term "public

utility" as indicating a class of enterprises alike in *all* particulars. We think the legislative history, above detailed, shows that the General Assembly had no such purpose as the second one above described, in using the term in question. Considerations of convenience prompted the legislature in selecting this phrase; and the mere fact that a single name was applied to all of the subjects of excise taxation does not, of itself, we submit, establish that all of them were in the same category for *all* purposes connected with excise tax levied, either in the mind of the legislature or as a matter of ultimate fact.

When this legislative history is so examined, then, we submit, the argumentative questions which counsel ask, on pages 57 and 58 of their brief, lose whatever weight they might otherwise have.

In their brief, counsel for appellants quote from authorities a rule, the existence of which we have already acknowledged, which is to the effect that classifications in taxation must, with due regard to the Fourteenth Amendment of the Federal Constitution, be made so as to conform to real and substantial differences among the subjects of taxation. The claim is made that the bills are binding upon the defendant, and upon the court, when they allege that the classification in rates of excise taxation does not correspond to any classification which exists in fact. We deny the binding force of any such allegations, and submit that they are conclusions of law, which are reached by our demurrers. Courts do not decide the constitutionality of tax laws upon testimony adduced—at least there is no precedent for any such proceeding, so far as we know, and counsel have cited none. It is true that the question as to whether or not an assessment for special improve-

ments exceeds the value of the benefits conferred upon the property assessed by the improvement is a question of fact. For that very reason, the citations on page 59 of the brief, being assessment cases, like those in the earlier pages thereof, to which we have already referred, are not in point. The court will take judicial notice of whatever facts may be necessary in order to sustain or to condemn the constitutionality of the classifications now under consideration.

In Pacific Express Company v. Seibert, 142 U. S., 339, a statute of Missouri was attacked as violative of the Fourteenth Amendment. The statute imposed an excise tax, measured by the gross receipts of express companies; its language is so very like that of the act under consideration here that we are tempted to quote fully from the statement by Mr. Justice Lamar, pages 340 and 341 of the official report; we forbear, however, but do invite the court's attention to the striking similarity in the phraseology of the two statutes and in the machinery whereby the tax in each case is to be assessed and collected.

In the bill it was averred that the Act of Missouri was unconstitutional because no law of the state imposed any similar or equivalent tax upon other common carriers engaged in similar business as complainant, who did not hire transportation in precisely the manner defined in the statutes.

The following appears in the opinion of the court:

> "This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper

sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens.

* * * * * * *

"The contention of the complainant, however, in this connection is, that the rule of uniformity and equality of taxation is destroyed by the arbitrary discrimination involved in the definition of what shall be taxed under the act, imposing upon certain persons or associations taxes from which other persons or companies of precisely the same kind, doing exactly the same kind of business, under exactly the same conditions, are exempt.

* * * * * *

"The legislation in question cannot be considered as invidiously discriminating against the express companies defined by it and in favor of other companies or persons that may carry express matter on certain other conditions or under different circumstances. There is an essential difference between companies defined by this act and railroad or steamboat companies and other companies that own their own means of transportation. The vital distinction is this: Railroad companies pay taxes on their roadbeds, rolling stock, and other tangible property as well as, generally, upon their franchise; and steamboat companies likewise pay a tax upon their tangible property. * * * On the other hand express companies, such as are defined by this act, have no tangible property, of any consequence, subject to taxation under the general laws. There is, therefore, no way by which they can be taxed at all unless by a tax upon their receipts for business transacted. (In this respect, of course, the court was imagining a vain thing because, since this decision, another way to tax express companies has been devised and approved by that court.) This distinction clearly places express companies, defined by this act, in a separate class from companies owning their own means of transportation. * * *".

This decision is cited, not because it is in point strictly, but because it clearly illustrates the fallacy of competitive conditions as a basis for classification for taxing purposes. Perhaps the chief point of reliance in the paragraph of the bills now under discussion is that which is seemingly based upon this erroneous assumption; that is to say, the claim is seemingly made that because railroad companies are forced to compete, *for traffic,* with interurban railroad companies, they ought, therefore, to be taxed by the same rate as interurban railroad companies, and an effort to tax them by a higher rate is discriminating as to them. Of course, this argument is to be distinguished from the other argument based on competitive conditions, which we have already referred to; this is competition for business and not competition in borrowing money. Nevertheless, in the face of the decisions which we have cited, we submit that there is no lesser fallacy in the argument that competition for traffic determines the basis for proper classification than in that which we have previously referred to.

The question, of course, which is raised by an attack upon any classification of subjects of legislation, either for the purpose of taxation or otherwise, is as to whether or not the classes which the legislature creates are *real* in the sense that they respectively include groups of individuals which are dissimiliar in some respect germane to the purposes of the legislation. It is not that the dissimilarity must exist in *every* respect in which the two groups might be compared. Thus, the mere fact that railroad companies and interurban railroad companies, for example, may be in a single group with respect to their negotiations for loans; and the mere additional fact that both of such utilities may be in a single group, with respect to *limited* competi-

tion for a *certain kind* of intrastate passenger traffic, are alike inconclusive as to the propriety or impropriety of taxing them separately and by different rates upon their privileges, if it can be pointed out that, in some other respect than the two mentioned, railroads and interurban railroads are essentially dissimilar to each other. Indeed, many other points of similarity might be imagined than those specifically alluded to in the bills. It might be shown that the charter powers of railroad companies and interurban railroad companies are quite similar though not identical.

But there are respects, so notorious as to invite judicial notice, it seems to us, in which railroads and interurban railroads are entirely dissimilar. In the first place, as we have already suggested, the competition between these two classes of utilities is limited to a very narrow field, namely, that of *local passenger traffic*. There is much intrastate traffic—in fact, the most valuable intrastate traffic—which cannot properly be characterized as local, or referred to as a real subject of competition between the two classes of utilities. It is possible, for example, to travel from Columbus to Cincinnati by electric interurban railroad; it is also possible to travel in this manner from Columbus to Cleveland, or from Columbus to Toledo; it is notoriously true, however, that there is no real competition here between steam railroads and interurban railroads, but that the steam railroads handle practically all of such business. Again, electric cars do a certain amount of express and freight business, but here, save in the fields in which there is no steam railroad whatever, there is no real competition between the two classes of roads; practically all carload shipments of freight; practically all heavy shipments of

an intrastate character, and indeed the greater bulk of the commodity transportation, both by freight and by express, is carried on by railroad companies. It appears, therefore, that the express reference in the bills to competition as a basis of similarity between railroads and interurban railroads is unfortunate from the standpoint of the pleader if this be a true criterion by which to judge the reasonableness of the classification formulated by the General Assembly of Ohio it affords excellent reasons for upholding that classification and not for condemning it.

Again, still adhering to the theory of the bills, for the purpose of illustration, it is not true that railroads and interurban railroads are in all respects upon an equality as to perfecting their financial arrangements. We take the liberty here also of supposing that the court will take judicial notice of familiar physical facts with respect to properties of railroads and interurban railroads, and also that the court will take judicial notice of the fact that the ability to borrow money is dependent upon the value of the physical property as security for the loan to be effected. Interurban railroads, in their present state of development, at least, are, considered as plants, much less valuable than steam railroads as a class. Their roadbeds are inferior and their rolling stock is much less extensive. We need not dilate upon this theme; suffice it to say that it is not true, as a matter of fact, that railroad companies and interurban railroad companies are upon an equality with respect to the facility with which they can respectively borrow money, and that the obvious advantage here is with the railroad companies.

In fact, while the two businesses seem very similar in many ways, there are several vital differences between

them, each one of which would form a proper basis of classification for the purpose of privilege taxation. A steam railroad operates heavy trains, stopping only at principal points for the carrying of its passenger traffic; an interurban railroad operates, generally, single cars, stopping frequently for this purpose. A steam railroad operates heavy freight trains, comprising many cars of great carrying capacity for the handling of this class of traffic; an interurban railroad operates single freight cars as a rule, the capacity of which is relatively small and the number of which, owned or hauled by any one road of this type, is relatively very small. Also, every railroad possesses terminal facilities, side tracks, etc., which are very unusual, to say the least, in the case of interurban railroads. There are, therefore, differences, and real ones, between the two classes of utilities, and these differences, we submit, fairly relate to the subject matter of taxation. See Savannah, T. & I. of H. Ry. v. Savannah, 198 U. S., 392.

Lastly, with respect to the alleged discrimination between railroads and interurban railroads, permit us to point out that it is not alleged in either bill that the plaintiff is injured by such discrimination. As a matter of fact such is not the case; at least, in so far as competition for traffic is concerned. Neither one of these plaintiffs, we believe, is paralleled by an interurban railroad, nor does either one of them meet such a railroad in competition in any way.

Introducing their discussion here, counsel cite the case of Railroad Company v. Poland, 10 N. P., n. s. 617. We invite the court's attention particularly to this case. We do not care to burden this brief with extensive quotation

from the able opinion of Judge Kinkead, therein, but wish to point out the tests which he adapts for the purpose of distinguishing between an interurban railroad and a commercial railroad, as he terms it. Let the court compare these tests, as formulated by Judge Kinkead, with those to which we have just called attention. It will be found, we think, that they correspond very closely. Now, complaint is made that the Ohio River & Western Railroad Company is operated in such a manner as to make its method of operation scarcely distinguishable from that of an interurban railroad. *If that be the case it is an interurban railroad,* and is liable for a tax of 1.2 per cent. upon its gross earnings, if Railroad Company v. Poland was correctly decided. It may be that this plaintiff might be heard to complain that the wrong rate had been assessed against it; certainly it has the same right as the Cincinnati, Georgetown & Portsmouth Railroad Company, the plaintiff in the case last cited, had to question the determination of the tax commission in this particular. So long as it has this right, and so long as the excise depends upon the manner in which the business is carried on, and not upon any arbitrary name which may be given to the corporation or to any particular motive power which may be used in the propulsion of its rolling stock, we submit that *it cannot be heard to complain that the law discriminates between it and an interurban railroad.* It will be time enough for the Ohio River & Western Railroad to complain that the law of Ohio discriminates, in the rate of excise taxation, between it and some imaginary competing interurban railroad, when the courts of Ohio, sustaining the purely administrative findings of the tax commission, have conclusively determined that it is a steam or commer-

cial railroad, within the meaning of the act. The decision in Railroad Company v. Poland, tends to show that if the claims made on page 60 of the brief, concerning the method of its operation, are true, the Ohio River & Western Railroad Company is not subject, under the act, to a tax of four per cent. on its gross earnings, but to a tax of 1.2 per cent. In the light of this decision, this plaintiff has mistaken its remedy; it is not entitled to complain of unconstitutional discrimination, on the part of the law, but it may be entitled to complain of an erroneous determination by the tax commission as to the class in which it belongs under the law. That being the case, the present action, in so far as it is based upon this particular claim, should be dismissed and the plaintiff relegated to the courts of the state, for the purpose of determining whether it is a steam railroad or an interurban railroad.

The citations found on pages 61 to 67, inclusive, of the answering brief are simply the antitheses of those hereinbefore made by us. The one group of cases illustrates one application of a single rule; the other, the opposite application of the same rule. Many other decisions of the Supreme Court of the United States than those which we have cited might be mentioned upon the point which we are now discussing. It hardly seems necessary for us to do so, however. Railroads are obviously unlike any other public utility which might be thought of with respect to the privileges exercised by them; they are proper subjects for excise taxes even if no other excise tax of any sort were levied. Therefore, they are proper subjects for excise taxes at a higher rate than any other utilities or undertakings which might be classed within an artificially created genus, designated as "public utilities." In fact, this

subject has become so hackneyed as to elicit from Mr. Justice Holmes, delivering the opinion of the Supreme Court of the United States in Kidd v. Alabama, 188 U. S., 730, the following remark:

> "We need not repeat the commonplaces as to the large latitude allowed to the states for classification upon any reasonable basis."

D. Alleged Discrimination Among Railroad Companies.

This complaint is based, not upon classification, but upon failure to classify; in a sense it is inconsistent with the rest of the bills. The argument of other portions of the bills seems to be that the statute is unconstitutional because the uniform rate as to all public utilities, which was provided for by the law as it existed prior to 1910 (see Appendix "B"), has been abandoned and a scheme of classification as to rates of taxation has been adopted in its stead; that is to say, the law is unconstitutional because all railroad companies are not taxed the same as all waterworks companies, for example. Now, the pleader, in the exercise of the privilege which is his, takes an opposite view of the case and complains that the law is unconstitutional because a different rate is not laid on some railroad companies from that exacted from others. The allegation is made that there are great and notorious differences among railroad companies with respect to the proportion of their total income, represented by intrastate earnings; therefore, it is urged that the law ought to tax those railroads as to which the proportion of intrastate earnings to the total earnings is high by a lesser rate than that by which those railroads whose intrastate earnings

constitute a relatively small portion of the total income are taxed.

The argument is fallacious; the state is not concerned with the total income of railroad companies but only with their intrastate earnings. If the facts alleged in these paragraphs of the bills are of weight at all they would tend to support the conclusion opposite to that stated in the bills. That is to say, if nearly all the business of one railroad is intrastate in character the privilege of carrying on its intrastate business ought to be and is much more valuable, relatively speaking, to it than the corresponding privilege enjoyed by another railroad, the intrastate earnings of which constitute a relatively small part of its total income.

But we repeat that the operation of this law is not to be judged by the proportional amount which it will deduct from the treasuries of any two railroad companies; all are taxed alike on the same privilege; if in addition to that privilege the one possesses another and different privilege, i. e., the privilege of engaging extensively in interstate commerce, which is not possessed by the other, or enjoyed to a lesser degree, that is something with which the State of Ohio has no concern whatever. The case here is perhaps something like Blackstone v. Miller, 188 U. S., 189, wherein this court refused to consider, under the Fourteenth Amendment, the complaint that a state law taxing a transfer, under the will of a non-resident, of deeds due the decedent, by its citizens, was unequal in operation because another state might and did tax the general inheritance. The following appears in the opinion of the court:

> "The fact that two states, dealing each with its own law of succession, both of which the plaintiff in error has to invoke for her rights, have taxed the right which they respectively confer, gives no cause for

complaint on constitutional grounds." (Citing Magoun v. Illinois Trust & Sav. Bank, 170 U. S., 283.)

When, therefore, the same person or corporation enjoys privileges under different jurisdictions, such as the State of Ohio and the State of Pennsylvania, or both states and the federal government, through participation in interstate commerce, it cannot be urged as against a state law taxing a prixilege enjoyed from and under the laws of the state, that another citizen or corporation, enjoying a like privilege from the one jurisdiction is not subject to taxation in the others; nor can it be urged conversely, by the individual who enjoys the privilege of the single jurisdiction, that a relatively greater amount of his assets is converted to the use of the state than is taken from those of his neighbor because, forsooth, he enjoys but the one privilege, while his neighbor enjoys, also, privileges connected with the privilege taxed by the state but which are beyond its jurisdiction. It is, therefore, a sufficient answer to this branch of the bill to point out that the State of Ohio is taxing the privilege of carrying on an intrastate railroad business and must tax that privilege in the hands of whomever she finds it. If she finds the privilege being exercised by a corporation which also exercises a like privilege under the laws of Pennsylvania, for which it is not taxed there, there is no principle of justice, equity or equality that would operate under the Fourteenth Amendment to compel the state so to adjust her excise law as to take from such a corporation a proportion of its income equal to that taken from another corporation which does not enjoy or exercise any privileges under any foreign jurisdiction; and if this proposition be conceded, then, it follows

that the use or enjoyment of privileges other than those enjoyed under the laws of a state by two corporations in different degrees, respectively, does not constitute such corporations members of different classes for purposes of taxation upon the privilege which they both enjoy in an equal degree under the laws of the state, simply because the exercise of that privilege, by reason of their different degrees of enjoyment of the foreign privileges constitutes a relatively smaller proportion of the entire business of the one than of the other.

From still another point of view, it does not necessarily follow that because Ohio taxes railroads which do little interstate business, the same as it taxes railroads which do much interstate business, discrimination necessarily results. The railroads which do a large amount of interstate business are subject to taxation by the federal government upon that business, and under such a tax the relative positions of the two imagined railroads would be precisely reversed; that the federal government may not in fact levy any such tax is immaterial; the fact remains that if such a tax were levied by that sovereignty, under a law similar to the Ohio excise tax law, the proportional amount of the total income of both so-called classes of railroads, referred to in the paragraph of the bills now under discussion, would be exactly the same under the joint operation of the Ohio law and such federal law.

But we do not by any means concede the truth of the allegations of this paragraph of the bills, though we contend, as above stated, that even if true they do not constitute sufficient ground for declaring the Ohio law unconstitutional. It is true that by comparing the plaintiff, The Ohio River and Western Railroad Company, for example,

with the great Pennsylvania system in Ohio, one might easily reach the conclusion that they are not members of the same natural class for purposes of taxation. This is simply because they represent the extremes of a class. A law is judged as to its constitutionality by facts, of which the court may take judicial notice. Muller v. Oregon, 208 U. S., 412. We, therefore, now ask the court to take judicial notice of the fact that the privilege of conducting an intrastate railroad business is an indivisible thing. It is the same privilege in the hands of a railroad which does nothing but intrastate business as it is in the hands of a railroad which also engages in interstate commerce. There may be extreme cases in which this privilege seems less valuable than in others, and perhaps the two plaintiffs here afford apt examples of such extreme cases; but, at the most, we contend that such cases are to be regarded rather as exceptional than as affording ground for a contention that a separate class ought to be created and that legislation which does not recognize the existence of such a class is void.

Cooley on Taxation, Third Edition, pages 390-291.

Tax laws are to be judged as to the equality of the protection which they afford, the uniformity of their operation, and their confiscatory and non-confiscatory nature; not by the practical result of their operation in one or two isolated cases, but by their result upon the class of subjects of legislation to which they apply as such. Should the legislature once embark upon the perilous enterprise of making a sub-classification of railroads, for purposes of privilege or excise taxation (and it is not to be denied that legislatures of other states have seen fit to do so) there is

no hard and fast rule by which the classes which it shall construct may be determined. Indeed, we submit that the contention which we are now discussing affords an excellent illustration of the scope of legislative discretion. Recurring again to the authorities already cited in this brief, and applying them here, we think it follows that the Ohio legislature has the right, in the exercise of the legislative discretion, which it indubitably has, to make a sub-classification of railroads for the purposes of excise taxation or not to make such a classification, as it may see fit. It has already, in the adoption of its comprehensive scheme of taxation, to which we have referred, classified the subjects of privilege taxation. The extent to which this classification shall go and the refinements of classification which shall or shall not be adopted are matters committed to its judgment and beyond the control of the courts.

E. Is the Increase in the Rate of the Excise as to Railroad Companies and other Public Utilities, Affected by the Act of 1910, an Attempt, Indirectly, to Impose a Burden upon Interstate Commerce?

Analysis of the argument suggested in paragraphs 31 and 32 of the bill in the case of The Marietta, Columbus and Cleveland Railroad Company, corresponding with paragraph 33 of that of the Ohio River and Western Railroad Company, shows the following reasoning:

The law as it existed prior to the passage of the Acts of May 10, 1910, was wholly unconstitutional as to railroads and pipe line companies because earnings and receipts from interstate commerce were employed for the purpose of ascertaining the amount of the tax.

The Act of May 10, 1910, so changed the phraseology of the excise tax law as to limit its effect solely to receipts and earnings from intrastate operations, but so increased the rate of excise taxation in the case of utilities engaged largely in interstate commerce as in effect to impose the same burden as had been theretofore imposed. Therefore, the tax under the Act of May 10, 1910, and the succeeding act, while nominally a tax on the privilege of engaging in intrastate business, and while nominally measured only by receipts or earnings from such business, is in reality a burden upon interstate commerce and constitutes a manifest effort to discriminate against utilities engaged in interstate commerce.

It is alleged, in support of the first proposition, that it "appears that said one per cent. tax was invalid." It is perhaps a novel proposition that a court should be called upon to decide the constitutionality of the existing law by passing upon the validity of an Act which has been repealed. The whole argument here appears to us to be far-fetched; we have already dwelt upon the reasons which are sufficient to support the classification of rates made by the Act. It cannot be contended, and, apparently, is not, that any but intrastate receipts and earnings are to be employed under the Act of 1910 and that of 1911 in the computation of the amount of the excise tax. Surely, if there had never been a law prior to May 10, 1910, imposing a privilege tax upon any public utility in this state, the argument above outlined could not have been made; the plaintiffs would have had to rest their case upon the grounds already treated of in this brief as to the propriety or impropriety of imposing upon railroads a

rate of excise taxation different from that imposed upon other public utilities.

This alone, it seems to us, is sufficient to dispose of the contention with which we are now dealing. It matters not what may have been the legislation of the State of Ohio prior to 1910; the question is as to the meaning and validity of legislation now in force.

In the lower court we contended at some length that the decision in Galveston, Harrisburgh & San Antonio Railroad Co. v. Texas, 210 U. S. 217, and other decisions of this court following that case fell far short of establishing the unconstitutionality of the "Cole law," but we then admitted that there was some doubt as to whether or not the "Cole law" was constitutional. Since the decision of the District Court in this case a lower Ohio court has held that the "Cole law" was in point of fact unconstitutional so far as it attempted to permit the use of earnings from interstate commerce in the computation of the excise tax imposed by it; or rather, being construed as it should be construed in deference to the limitations of the Federal Constitution, it should be regarded as applicable only to intrastate earnings, the two classes of earnings being separable. In other words, it was interpreted by the lower Ohio court in deference to the limitations of the Federal Constitution precisely as an earlier Ohio law was interpreted by this court in Ratterman v. Western Union Telegraph Co., 127 U. S. 411. But the fact, if it be a fact, that the "Cole law" of 1902 was partly unconstitutional as evidenced by the decision of the lower Ohio court in 1913 does not establish the conclusion that the legislature of Ohio deemed it to be unconstitutional in 1910. For it was in 1910, and through the medium of

the so-called "Langdon law" of that year, abstracted in "Appendix B," that the Ohio legislature made the changes in the rates of excise taxation complained of by appellants. True, at that time the legislature may have known through the attorney general's opinion referred to and quoted in appellants' brief at pages 69 et seq., thereof, that the constitutionality of the "Cole law" was *questioned* by the Buckeye Pipe Line Company, but the very opinion upon which appellants place such reliance did not as they themselves admit "concede the invalidity of the Cole law." In substance, it merely advised the general assembly of the state to so adjust the basis of its excise taxation as to remove all question respecting the alleged interference with interstate commerce.

We doubt whether this court can impute to the general assembly of Ohio the motive of complying with the advice of the attorney general of that state, but we are not disposed to be captious and are willing to meet counsel on their own ground. Let it be admitted that the legislature did entertain the precise motives suggested by the attorney general's communication; what were those motives? Quite palpably, they are as follows:

1. The readjustment of the system of excise taxation should be upon a basis which would not employ interstate earnings in the measurement of the tax.

2. The net result of the readjustment should be such as not to diminish the revenues of the state from this source.

Appellants' counsel will not, we are sure, take exception to our analysis here, but they insist that these motives are tantamount to the sinister and concealed motive of continuing to impose by indirection a burden upon inter-

state commerce. The mere statement of these propositions refutes the last one stated. The legislature of Ohio in point of fact intended to discontinue what might be deemed to be a burden upon interstate commerce and to impose the burden of taxation exclusively upon intrastate commerce.

The argument here resolves itself into the proposition that the exaction of a gross amount of revenue from intrastate commerce exclusively, equal in amount to that formerly exacted in gross from intrastate and interstate commerce combined, has the effect of continuing the burden upon interstate commerce.

This is false logic. It ignores again the fundamental nature of the power to tax. As we understand the theory of taxation the sovereign power of the state, through its legislative department, first determines *how much revenue it needs*, then it exerts the taxing power by way of apportioning the sum needed among the subjects of taxation within this jurisdiction by one of the methods available to it. Judge Cooley says at page 41 of his work in Taxation, in discussing the nature of the taxing power:

> "It is the making of rules and regulations in which the necessary revenues for all the needs of government are to be apportioned among the people and collected from them."

And again at page 411, speaking of the function of apportionment, he says:

> "Taxation is based upon the idea of calling upon the people for equal and proportional contributions to the public wants, that the burdens of government may fall ratably upon all who in justice should bear them. The apportionment of the burden is, therefore, a necessary element in all taxation. * * *."

"Taxes cannot be laid without apportionment and the power of apportionment is therefore unlimited unless it be reserved as a part of the power of taxation. Quoting Ruggles J. in People v. Brooklyn, 4. N. Y. 419, 426-7.

The motive of the Ohio legislature leading up to the enactment of the "Langdon law" of 1910 was precisely that motive which must always actuate any legislative body in levying a tax. The State of Ohio needed, as its attorney general said in his opinion, a million and a quarter dollars or perhaps two million dollars of revenue. In the past it had been accustomed to secure that revenue by excise taxation. It was not desired to employ any other method than the one which had been theretofore invoked. It determined to tax the privilege of engaging in intrastate public utility activities, and it apportioned the entire burden of its need for two million dollars in revenue among these occupations by way of excise taxation. This it had an undisputed right to do. No authority can be cited to the contrary and none is cited in the brief. No inference of improper motive can be drawn from the mere fact that the Ohio legislature adjusted its rates of taxation to its needs of revenue, because this is what any legislature has at all times the right to do.

Appellants' argument here seems to be based upon some vague idea of inequality. If the inequitableness of the conduct of the Ohio legislature can enter into the equation at all, we should like the court to consider certain facts which are aside from the record, but no more so than the facts upon which counsel rely in connection with this point.

The "Cole law," and its predecessor, the act of 1896, as will be apparent from "Appendix B," were in force for a period of fourteen years before the suspicion arose that they might be held unconstitutional. During all this time, despite the fact that earnings from interstate commerce were continually used as the basis of assessment; not a voice was raised in protest by any of the railroads or other public utilities subject thereto until the Buckeye Pipe Line Company took the step described in the attorney general's opinion.

Indeed, the Buckeye Pipe Line Company was the only public utility which ever served notice upon the state that it would refuse to pay the tax. The railroad companies in the years 1910 and 1911 did not resist the tax but paid it notwithstanding the decision of the Galveston, Harrisburg & San Antonio Railroad Co. v. Texas, supra, as they had paid it for the twelve years then next preceding.

Under these circumstances it was surely not inequitable nor unjust for Ohio to seek to apportion its readjusted excise taxes among those who had willingly paid such taxes for so long a period, upon a basis which would exact from each class of public utilities subject thereto, approximately the same amount of revenue as had theretofore been forthcoming from them, respectively. Considered as an effort at just, equal and uniform distribution of the burden, we submit that the Ohio legislation is in every way to be commended.

But particular attention should be directed to the precise object of appellants' counsel in complaining of the increased rates under the "Langdon law" and the law

of 1911, and their line of argument in connection therewith.

This is sufficiently disclosed by what appears on page 67 of the brief, as follows:

> "The act of May 10, 1910 * * * by leaving the percentages of the other utilities substantially as they were and multiplying that of railroads and pipe line companies (which were notoriously the utilities extensively engaged in interstate commerce) fourfold, condemned itself as an open and flagrant attempt to evade the bar of the commerce clause and created, in substance if not in form, a burden on interstate commerce."

Again, on page 68, counsel say that:

> "We contend that the enormous increase in the percentage of railroads and pipe line companies was due to the fact that it was conceived that about three-fourths of their business was interstate * * *; in other words, that the tax was increased four-fold because such utilities were engaged in interstate commerce."

We think a more exact statement of counsel's position here, than they have themselves made, would be as follows:

> The rate increases made by the Ohio legislation of 1910 constituted an attempt to continue to burden interstate commerce by indirection because the rates applicable to utilities engaged in interstate commerce were increased so *greatly*, while the rates applicable to utilities not so engaged to any appreciable extent were increased but *slightly*.

That is to say, in order to support the claim that the General Assembly of Ohio, in an indirect way, sought to burden interstate commerce by its readjusted excise tax, it is necessary to show that the rate increases were

applicable generally to utilities engaged in interstate commerce transportation; that the line of demarcation between those utilities as to which the rate was greatly increased and those utilities as to which the rate was slightly increased, is the line of demarcation between those engaged in such interstate commerce transportation and those not so engaged to any considerable extent. Otherwise the argument falls to the ground; because all that would be proved by calling attention to the great increase in the rates applicable to railroads and pipe line companies would be a motive to burden these particular utilities, unless it could also be shown that these two were the only ones extensively engaged in transporting interstate commerce.

Counsel have themselves shown what increases of rates were made by the "Langdon law" of 1910 as compared with its predecessor, the "Cole law," and we need not repeat what is set forth at page 68 of their brief, for this purpose.

We now call attention to the following facts which are obvious from the statement made by counsel themselves:

Natural gas, express and telegraph companies are just as extensively engaged in interstate transportation as are railroad companies; so, indeed, are interurban railroad companies engaged in this transportation, though perhaps to a lesser degree than the other companies named. Again, if the court will, as it may, take judicial notice of the situation of the navigable waters in and around the State of Ohio, the conclusion will readily be reached that water transportation companies are even more extensively engaged in interstate commerce than railroads and pipe line companies; indeed this class of public utilities is,

perhaps, of all those subject to the excise tax, the most extensively engaged in the transportation of that commerce, in the relative sense.

These facts completely disprove the charge or imputation of an intention specifically to burden or to continue to burden *interstate commerce as such*. *If interstate* commerce had been the target of the legislature, would not the same increase in rates have been made as to all utilities customarily and incidentally engaged in transporting that commerce as was made with respect to railroads and pipe lines? We need not carry the analysis further, though the temptation to do so is great. The fact simply is that the Ohio legislature did not increase the rates of all utilities engaged in interstate commerce transportation as compared with the rates of those not so engaged, and that no argument to the contrary can be founded upon the increase with respect to railroad companies and pipe line companies alone.

We pass by certain other considerations which might be pertinent in connection with this contention of counsel with the bare mention of them. Thus, as to railroads, the change in the law was far more fundamental than the mere change in rate, an entirely new basis of computation being provided, aside from the change from the partial use of interstate earnings to the exclusive use of intrastate earnings. This change in the method of computation is such that it does not necessarily follow that the new basis of the tax will have the effect of exacting the same amount of revenue formerly exacted from railroad companies under the "Cole law."

Again, the Langdon act of 1910 and its successor of 1911 cannot be characterized as actuated by the motive im

puted to the legislature by counsel, for the reason that these acts are much more far-reaching in their scope and effect than a mere change in the rate or basis of excise taxation. An examination of Appendixes "A" and "B" will show the adoption of an entirely new and comprehensive scheme of taxation by the State of Ohio, largely affecting public utilities, it is true, but affecting, as well, taxation of property generally. We refer, of course, to the creation of the state tax commission and the imposition in it of numerous functions relating to all kinds of taxation formerly residing in various officers, boards and tribunals. The fundamental purpose of the legislation, therefore, was to change the system of administering all the tax laws of the state.

For all the reasons mentioned, we submit that appellants' argument respecting the imputed intention of the general assembly to impose by indirect methods a continuing burden upon interstate commerce as such, lacks foundation in fact. This being the case, we do not deem it necessary even to discuss the question as to whether, under any circumstances whatsoever, a tax based *exclusively* upon intrastate earnings could be held to impose a burden upon interstate commerce. Of course, we submit that, on the face of things, such a tax could under no circumstances be regarded as having any such effect.

B. THE ASSERTION THAT THE EXCISE TAX IN QUESTION IS IN EFFECT AN ADDITIONAL TAX UPON PROPERTY, AND HENCE LACKING IN UNIFORMITY AND A DENIAL OF THE EQUAL PROTECTION OF THE LAW.

This contention is stated at page 75 of appellant's brief but is not pressed. In fact it is expressly stated that this assignment of error is an alternative one for consideration in the event that we take a position which we have not, as a matter of fact, taken.

Therefore, we may dismiss this contention in its entirety with the citation of the following authorities, all supporting the view that an excise or privilege tax may be imposed by a state in addition to the taxation of the property employed in the exercise of the privilege by a rule which takes into account the intangible elements of value resulting from the use of such property as an organic whole.

Flint v. Stone-Tracy Co., supra.
Southern Gum Co. v. Laylin, supra.
Adler v. Whitbeck, supra.
Anderson v. Brewster, 44 O. S. 576.
State v. Ferris, supra.
Ashley v. Ryan, supra.
Western Union Telegraph Co. v. Mayer, supra.

And especially in this connection we cite the case of Express Co. v. State, 55 O. S. 69.

In that case the very claim advanced by appellants here was made and refuted by the Supreme Court of Ohio. On page 80 of this opinion the court makes use of the following language:

"What is known as the Nichols law, held constitutional in State ex rel. v. Jones, 51 Ohio State, 492, im-

poses a tax upon property only, and does not impose any tax for the privilege of exercising a franchise in this state. Before the passage of the Nichols law express companies were taxed on the property within this state under Section 2744, Revised Statutes, the same as other corporations, and they paid a tax under Section 2778, for the privilege of doing business in this state. The Nichols law prescribed new rules for ascertaining and valuing the property of express companies, so as to largely increase the valuation of their property for the purposes of taxation, and repealed the tax for the privilege of doing business in this state. The statute in question again enacted the tax for the privilege of doing business in the state, and named it an 'excise tax.' This tax is the same as that under the statute in question in Telegraph Co. v. Mayer, 28 Ohio State, 521, and having been held, as we think rightly, constitutional then, it must be held constitutional now."

This decision, in connection with the other decisions cited, constitutes a conclusive and binding interpretation by the Supreme Court of Ohio of Article 12, Section 2, of the Ohio Constitution so far as this court is concerned.

(See also the decisions cited on this point by the District Court.)

B. The Claim that Earnings from Foreign Commerce are Required to be Included within those upon which the Tax is to be Computed.

This contention illustrates the diligence manifested by appellants' counsel in an effort to find something upon which to base an attack upon the Ohio law. It is so technical and far-fetched that we hesitate even to discuss it. It grows out of the fact that Sections 83 and 88 of the act of 1911 require the reports to be filed by railroad

companies, and the computations of taxes thereon be made, to include all gross earnings, except "all earnings derived wholly from *interstate business* or business done for the federal government."

Of course the court will not overlook the other section of the law (Section 97) which states that the tax is "upon the privilege of carrying on its *intrastate* business" and is "to be computed upon the amount so fixed * * as the gross earnings of such company on its *intrastate* business for the year covered by its annual report * * *."

The law, then divides all business and earnings therefrom into two classes, viz., interstate and intrastate. It simply does not *refer to* or recognize foreign business as such; therefore, the foreign business, whenever it exists, must be treated either as interstate or as intrastate. Obviously, it will be treated as interstate.

Authorities might be cited to the general effect that when the terms "intrastate" and "interstate" are thus used in obvious contradistinction, the latter includes, without express reference thereto, all the subjects within the regulatory power of the Congress of the United States and the former includes those subjects, and those only, within the exclusive regulatory powers of the several states. In fact the word "interstate" is not used in the Constitution of the United States at all, the phraseology of its statement being that "the congress shall have the power * * to regulate commerce with foreign nations, and among the several states and with the Indian tribes."

It is not necessarily true that the term "interstate" whenever and wherever used must refer only to "commerce

among the several states." In the sense in which we think it is employed in the Ohio statute it means and includes all commerce *crossing the state line* as distinguished from the business which is confined within the territorial limits of the state.

But even if a construction be given to the Ohio statute so strained as that upon which counsel base this objection to it, we submit that on the authority of Ratterman v. Western Union Telegraph Co., 127 U. S. 424, 425, the law should be, by this court, in a proper case, simply held inapplicable to commerce with foreign nations and with the Indian tribes and the earnings therefrom, without impairing the validity of the entire act.

A proper case for the making of the objection sought to be made by counsel in this case cannot be instituted until and unless the taxing authorities of the State of Ohio attempt to include within the earnings upon which the tax is to be computed those from foreign commerce or commerce with the Indian tribes. It is not alleged in the bill that any such attempt has been made with respect to these appellants or with respect to any railroad or public utilities whatever. The contrary is, of course, true in point of fact, and the administrative officers of the state have actually been interpreting the word "interstate" as inclusive of foreign commerce. This being the case, or rather, in the absence of any allegation to the contrary, we submit that no federal question of the kind sought to be raised by counsel in this connection can be made.

### N. P. The Claim that the Act is Unconstitutional because of its Effort to Prevent Judicial Inquiry and Force Obedience to its Terms and Administrative Acts Thereunder, Irrespective of their Validity.

The alleged coercion attempted by the Ohio law can be predicated only upon a strict and literal interpretation of Section 120 thereof, quoted at page 82 of appellants' brief. At page 65 counsel make the point that under the literal language of this section no corporation could safely resist the collection of an excise tax.

Respecting this view, we may say that, whatever be the exact language of Section 120, standing alone, it is clear that it is not intended to be the only remedy of the state for the collection of the tax. Numerous others are provided, such as the imposition of penalties, the institution of a civil action in the name of the state for the recovery of the tax, and remedies by injunction and quo warranto. Obviously, if the charter cancellation provided for by Section 120 is to follow in all cases, the other remedies cannot be invoked at all. The various sections of the act must, then, be read together and interpreted in accordance with their general effect. Having regard to such joint effect, it appears that the remedy provided for by Section 120 is intended to be a last resort to be invoked by the authorities of the state only in the event that all other means for the collection of the taxes by process of law have failed. Such has actually been the interpretation placed upon this section by the administrative authorities of the state.

But whatever may be the fault of any or all of the penal provisions of the Ohio act of 1911, we submit that their alleged unconstitutionality cannot be used as counsel attempt to use it, for the purpose of overthrowing the whole act.

The very authority which counsel themselves cite, Ex parte Young, 209 U. S. 123, establishes this conclusion. The court in that case held the penal provisions of the Minnesota statute involved in the so-called "Minnesota Rate Case" to be unconstitutional on the ground that they were calculated to prevent a judicial investigation of the validity of the rates adopted by the state railroad commission. This did not prevent this court in the main action, known as the "Minnesota Rate Case," decided June 9, 1913, from holding that the rates themselves were valid, at least in part. Hence we submit that as a matter of law, the penal provisions of an act imposing a duty or an exaction may be avoided without affecting the validity of the remainder of the act. This proposition is indeed elementary and other authorities might be cited thereon, but the Minnesota Rate case offers so striking and recent an example that we feel that further citation is unnecessary.

Furthermore, as counsel themselves acknowledge at page 90, there is a section of the law of 1911, viz., Section 160 thereof, which clearly indicates the legislative intention to separate the penalty sections as such from the remainder of the act, and clearly shows that the legislature would have imposed the tax without the penalty. In fact, by examining the laws abstracted in "Appendix B" of this brief, it will be ascertained that the same tax had been imposed in previous years without some, at least,

of these penalties, which are new in the law of 1911. So that it cannot be said, as counsel would have it, that the General Assembly of Ohio would not have passed the act as a whole without the penalty provisions and those respecting the right to sue, to which they object.

As was well said by the court below with respect to this point:

> "We are not concerned with the validity or the operation of any of such sections for the reason that the pleadings tender no issue regarding them; moreover the penalties are a separate part of the act, and whether equitable or not may be determined in a case involving an attempt to enforce them. Fline v. Stone-Tracy Co., 220 U. S. 177; Wilcox v. Consolidated Gas Co., 212 U. S. 53, 54."

In this portion of its opinion then, the District Court not only disposes of the contention that the entire act may be held invalid because of the alleged unconstitutionality of some of the so-called coercive sections thereof, (which would at the most merely revive the antecedent act which also exacts a four per cent. tax from railroad companies); but it also shows the reason for denying the temporary injunction, even though among other things it is asked against the authorities of the state to restrain them from proceeding to enforce these penalties. As stated by counsel for appellants themselves at page 90 of their brief:

> "The invalidity of the sections now under consideration would warrant and require the granting of the temporary injunction for which the plaintiffs are now asking in the *event that their bills are held to state a cause of action.*"

This is perhaps correct, but we think the court will conclude that the bills do not state causes of action and that appellants are liable for the tax. That being the case they have no standing to enjoin its enforcement by any method, however objectionable, especially until some objectionable method is actually threatened to be employed as to them.

## CONCLUSION.

The entire decision of the District Court which is printed in the transcripts, is commended to the perusal of this court. It deals with all the main questions in the cases and supports its conclusions by numerous authorities.

We submit that the Ohio excise tax law of 1911 is not open to any of the constitutional objections asserted against it as a whole, nor does the Ohio Constitution, as interpreted in the case of Southern Gum Co. v. Laylin, supra, nor any other principle of constitutional law, warrant the claim that these appellants, because of their financial straits, may be excused or exempted from the payment of the tax which that law imposes upon them.

Respectfully submitted,

Timothy S. Hogan,
Attorney General of Ohio.
Frank Davis, Jr.,
Clarence D. Laylin,
Attorneys for Appellees in both cases.

## APPENDIX A.

**Abstract of present laws of the State of Ohio, relating *substantively* to the taxation of public utilities; including also so much of the act of May 31, 1911, as is necessary to illustrate its general scope.**

* * * * *

"102 OHIO LAWS, 224

An act to repeal Sections 5446 to 5542-8, inclusive and 5542-10 to 5542-24, inclusive, of the General Code, as enacted May 10, 1910 (101 Ohio L., 399), relating to the tax commission of Ohio and to further define its powers and duties. (Passed May 31, 1911.)

(The first thirty-seven sections of this act provide for the organization and internal administration of the Tax Commission of Ohio.)

Sec. 1435-36. Section 38. The term "commision" or the term "tax commission" when used in this act or in the laws which the commission is required to administer, means the tax commission of Ohio. The term "commissioner" means one of the members of such commission.

Section 5415. Section 39. The term "public utility" as used in this act means and embraces each corporation, company, firm, individual and association, their lessees, trustees, or receivers elected or appointed by any authority whatsoever, and herein referred to as express company, telephone company, telegraph company, sleeping car company, freight line company, equipment company, electric light company, gas company, natural gas company, pipe line company, waterworks company, messenger com-

pany, signal company, messenger or signal company, union depot company, water transportation company, heating company, cooling company, street railroad company, railroad company, suburban railroad company, and interurban railroad company, and such term "public utility" shall include any plant or property owned or operated, or both, by any such companies, corporations, firms, individuals or associations.

Section 5416. Section 40. That any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated:

When engaged in the business of conveying to, from, or through this state, or part thereof, money, packages, gold, silver, plate or other article, by express, not including the ordinary lines of transportation of merchandise and property in this state, is an express company;

When engaged in the business of transmitting to, from, through, or in this state, telephonic messages, is a telephone company;

When engaged in the business of transmitting to, from, through, or in this state, telegraphic messages, is a telegraph company;

When engaged in the business of operating cars for the transportation, accommodation, comfort, convenience, or safety of passengers, on or over any railway line or lines, in whole or in part within this state, such line or lines not being owned, leased or operated by such company, whether such cars be termed sleeping, palace, parlor, chair, dining or buffet cars, or by another name, is a sleeping car company;

When engaged in the business of operating cars for the transportation of freight, whether such freight is owned by such company, or any other person or company, over any railway line or lines in whole or part within this state, such line or lines not being owned, leased or operated, by such company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture or refrigerator cars, or by another name, is a freight line company.

When engaged in the business of furnishing or leasing cars, whatsoever kind or description, to be used in the operation of any railway line or lines, wholly or partly within this state, such line or lines not being owned, leased or operated, by such company, is an equipment company;

When engaged in the business of supplying electricity for light, heat or power purposes, to consumers within this state, is an electric light company;

When engaged in the business of supplying artificial gas for lighting or heating purposes, to consumers within this state, is a gas company;

When engaged in the business of supplying natural gas for lighting, heating or power purposes, to consumers within this state, is a natural gas company;

When engaged in the business of transporting natural gas or oil through pipes or tubing, either wholly or partially within this state, is a pipe line company;

When engaged in the business of supplying water through pipes or tubing, or in a similar manner to consumers within this state, is a waterworks company;

When engaged in the business of supplying messengers for any purpose is a messenger company;

When engaged in the business of signaling or calling by electrical apparatus, or in a similar manner, for any purpose is a signal company;

When engaged in the business of operating a union depot or station for railroad, suburban or interurban railroad purposes, is a union depot company;

When engaged in the transportation of passengers or property, by boat or other water craft, over any water way, whether natural or artificial, from one point within this state to another point within this state, or between points within this state and points without this state, is a water transportation company;

When engaged in the business of supplying water, steam or air through pipes or tubing, to consumers within this state, for heating purposes, is a heating company;

When engaged in the business of supplying water, steam or air through pipes or tubing, to consumers within this state, for cooling purposes, is a cooling company;

When engaged in the business of operating a street, suburban or interurban railroad company, wholly or partially within this state, whether cars used in such business are propelled by animals, steam, cable, electricity, or other motive power, is a street, suburban or interurban railroad company;

When engaged in the business of operating a railroad, either wholly or partially within this state, on rights-of-way acquired and held exclusively by such company, or otherwise, is a railroad company.

Section 42. The term "gross earnings" shall be held to mean and include the entire earnings for business done by any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, from the operation of any public utility, or incidental thereto, or in connection therewith. The gross earnings for business

done by an incorporated company, engaged in the operation of a public utility, shall be held to mean and include the entire earnings for business done by such company under the exercise of its corporate powers, whether from the operation of the public utility itself or from any other business done whatsoever.

Section 5419. Section 43. The property owned or operated by a public utility, required to make return to the commission of its property to be assessed for taxation by the commission, shall be deemed and held to include such utility's plant or plants and all real estate necessary to the daily operations of the public utility and all other property, moneys and credits owned or operated, or both, by it wholly or in part within this state, used in connection with or as incidental to the operation of the public utility, whether the same be held in common or by the individuals operating such public utility. In the case of incorporated companies, all the real estate, personal property, moneys and credits owned and held by such corporation within this state in the exercise of its corporate powers, or as incidental thereto, whether such property, or any portion thereof, is used in connection with such public utility business or not, shall be conclusively deemed and held to be the property of such public utility.

Section 5420. Section 44. Each public utility, as defined in this act, except express, telegraph and telephone companies, shall annually, on or before the first day of March, make and deliver to the tax commission of Ohio, in such form as the commission may prescribe, a statement, with respect to such utility's plant or plants and all property owned or operated, or both, by it wholly or in part within this state.

Section 5421. Section 45. Such statement shall be signed and sworn to under the oath of the person constituting such public utility, if a person or under the oath of the president, secretary, treasurer, superintendent or principal accounting officer or person of such firm, association or corporation, if a firm, association or corporation.

Section 5422. Section 46. Such statement shall contain:

1. The name of the company.

2. The nature of the company, whether a person or persons, firm, association or corporation, and under the laws of what state or country organized.

3. The location of its principal office.

4. The name and postoffice address of the president, secretary, auditor or the principal accounting officer or person, treasurer, and superintendent or general manager.

5. The name and postoffice address of the chief officer or managing agent of the compaany in this state.

6. The number of shares of the capital stock.

7. The par value and market value, or if there is no market value, the actual value of its shares of stock on the first day of the month of January in which the statement is made; the amount of capital stock subscribed, and the amount thereof, actually paid in.

8. A detailed statement of the real estate owned by the company in this state, where situated, and the value hereof as assessed for taxation, making separate statements of that part used in connection with the daily operations of the company, and that part used otherwise, if any such there be.

9. An inventory of the personal property, including moneys, investments and credits, owned by the company,

in this state, on the first day of the month of January in which the statement is made, where situated, and the value thereof, making separate statements of that part used in connection with the daily operations of the company, and that part used otherwise if any such there be.

10. The total value of the real estate owned by the company and situated outside of this state, making separate statements of that part used in connection with the daily operations of the company, and that part used otherwise if any such there be.

11. The total value of the personal property owned by the company and situated outside of this state, making separate statements of that part used in connection with the daily operation of the company, and that part used otherwise, if any such there be.

12. The total amount of bonded indebtedness and of indebtedness not bonded; the gross receipts for the preceding calendar year from any and all sources, and the gross expenditures for the preceding calendar year.

13. In the case of street, suburban or interurban railroad companies, and railroad companies, such statements shall also give:

(a) The whole length of their lines and the length of so much of their line as is without and is within this state, including branches in and out of the state, which shall include lines and branches such companies control and use under lease or otherwise.

(b) The railway track in each county in the state, through which it runs; giving the whole number of miles of road in the county, including the track and its branches and side and second tracks, switches, and turnouts therein and the true and actual value per mile of such railway

in each county, stating the valuation of main track, second or other main tracks, branches, sidings, switches and turnouts separately.

(c) Such statement as to character, classes, number, amounts, values, locations, ownership or control and use of rolling stock, as the commission may require.

(d) The depots, station houses, section houses, freight houses, machine and repair shops and machinery therein, and all other buildings, structures and appendages connected thereto or used therewith, including tool houses, and the tools usually kept therein, together with telegraph and telephone lines owned or used, and the true and actual value of all buildings and structures and all such machinery, tools and appendages, including such telegraph and telephone lines; and the true and actual value thereof in each county in this state in which it is located.

(e) The gross earnings for the year, including earnings from telegraph lines, which shall be stated separately, on the whole length of the road, including the branches thereof, in and out of the state, and also such earnings within this state on way freight and passengers.

* * * * *

Section 5423. Section 47. On the second Monday of June of each year, the commission shall ascertain and assess, at its true value in money, all the property in this state of each such public utility, subject to the provisions of this act, other than express, telegraph and telephone companies.

Section 5424. Section 48. In determining the value of the property of each such public utility to be assessed and taxed within the state, the commission shall be guided by the value of the property as determined by the informa-

tion contained in the sworn statements made by the public utility to the commission and such other evidence and rules as will enable it to arrive at the true value in money of the entire property of such public utility within this state, in the proportion which the value of such property bears to the value of the entire property of such public utility.

Section 5425. Section 49. The property of such public utilities to be so assessed by the commission shall be all the property thereof, as defined in section forty-three of this act.

Section 5426. Section 50. Before the assessment of such property of such public utilities shall have the right, upon written application, to appear before the commission and to be heard in the matter of the valuation of its property for taxation.

Section 5427. Section 51. Between the date herein fixed for the assessment of the property of any such public utility for taxation by the commission, and the date herein fixed for the certification by it of the apportioned value to the county, or to the several counties as herein provided, the commission may, on the application of such public utility or any person interested therein, or on its own motion, correct the assessment or valuation of its property in such manner as will in its judgment make the valuation thereof just and equal.

Section 5428. Section 52. The commission shall deduct from the total value of the property of each of such public utilities in this state, as assessed by it, the value of the real property owned by such public utilities, if any there be, as otherwise assessed for taxation in this state, and shall justly and equitably equalize the relative values thereof.

Section 5429. Section 53. The commission shall ascertain all of the personal property, roadbed, stations, power houses, poles, wires, water and wood stations and real estate necessary to the daily running operations of the road, moneys and credits of each railroad company and each suburban or interurban railroad company, having any line, or road, or part thereof in this state and the undivided profits, reserved or contingent fund of the company, whether in moneys, credits, or in any manner invested, and the actual value thereof in money, and also locomotives, motors and cars not belonging to the company, but hired for its use or run under its control on its road by a sleeping car company or other company. Such rolling stock not belonging to it, but under its control, may be returned by such public utility separate from its own property, and if so returned the commission shall fix the valuation of such property separately, but must include the amount in the aggregate valuation.

Section 5430. Section 54. The value of such property, moneys and credits of each such street, suburban and interurban railroad and railroad companies, as found and determined by the commission, shall be apportioned by the commission among the several counties through which the road, or any part thereof, runs, so that to each county and to each taxing district therein, shall be apportioned such part thereof as will equalize the relative value of the real estate, structures and stationary personal property of such company therein, in proportion to the whole value of the real estate, structures and stationary personal property of the company in this state; and so that the rolling stock, main track, roadbed, power houses, poles, wires, supplies, moneys and credits of the company

shall be apportioned in like proportion that the length of the road in such county, bears to the entire length thereof in all the counties, and to each city, village and district or part thereof therein.

Section 5431. Section 55. If the line of such company is divided into separate divisions or branches, so much of the rolling stock thereof as belongs to or is used solely upon such divisions or branches shall be apportioned in like manner to the county, or counties, and to each taxing district therein, through which such branch or division runs. The commission shall certify to each county auditor such apportionment.

Section 5445. Section 56. When a street, suburban or interurban railroad company has part of its road in this state and part thereof in another state or states, the commission shall take the entire value of such property, moneys and credits of such public utility so found and determined, in accordance with the provisions of this act, and divide it in the proportion the length of the road in this state bears to the whole length thereof, and determine the principal sum for the value of the road in this state accordingly, equalizing the relative value thereof in this state.

Section 5448. Section 59. The county auditor shall place the apportioned value on the tax list and duplicate and taxes shall be levied and collected thereon, in the same manner and at the same rate, as other personal property in the taxing district in question.

Section 5449. Section 60. On or before the first day of August, annually, every express, telegraph and telephone company, doing business in this state, under the oath of the person constituting such company, if a person, or

under the oath of the president, secretary, treasurer, superintendent or chief officer in this state of such association or corporation, if an association or corporation shall make and file with the commission a statement, in such form as the commission may prescribe.

Section 5450. Section 61. Such statement shall contain:

* * * * *

12. The total amount of bonded indebtedness and of indebtedness not bonded; the gross receipts from whatever source derived of business wherever done, for the year ending on the thirtieth day of June next preceding; and the total gross expenditures for such year.

13. In the case of telegraph and telephone companies, such statement shall also set forth, the whole length of their lines, and the length of so much of their lines as is without and is within this state, which shall include the lines such telegraph and telephone companies control and use under lease or otherwise, and the miles of wire in each taxing district in this state.

14. In the case of telegraph and telephone companies, such statement shall also contain the entire gross receipts, including all sums earned or charged, whether actually received or not, for the year ending the thirtieth day of June, from whatever source derived, whether messages, telephone tolls, rentals, or otherwise, for business done within this state, including the company's proportion of gross receipts for business done by it within this state in connection with other companies, firms, corporations, persons or associations, excluding therefrom all receipts derived wholly from interstate business or business done for the federal government. Such statement shall also

contain the total gross receipts of such company, for such period, from business done within this state.

15. In the case of express companies, such statement shall also contain the entire receipts, including all sums earned or charged, whether actually received or not, from whatever source derived, for business done within this state, for the year ending the thirtieth day of June, for and on account of such company, including the company's proportion of gross receipts for business done by it within this state in connection with other companies, firms, corporations, persons or associations, excluding therefrom all receipts derived wholly from interstate business or business done for the federal government. Such statement shall also contain the total gross receipts of such company, for such period, from business done within this state.

16. In the case of express companies, the gross receipts for the year ending the thirtieth day of June, from whatever source derived, of each office within this state, giving the name of each office in this state.

17. In the case of express companies, such statement shall also contain the whole length of the lines of rail and water routes, over which the company did business on the thirtieth day of June, and the length of so much of such lines of land and water transportation as is without and within this state, naming the lines within this state.

Section 5451. Section 62. On the first Monday in September, of each year, the commission shall ascertain and assess the value of the property of the express, telegraph and telephone companies in this state.

Section 5452. Section 63. In determining the value of the property of such companies in this state, to be taxed within the state and assessed as herein provided, the com-

mission shall be guided by the value of the property as determined by the value of the entire capital stock of the companies, and such other evidence and rules as will enable such commission to arrive at the true value, in money, of the entire property of such companies within this state, in the proportion which such property bears to the entire property of the companies, as determined by the value of the capital stock thereof, and such other evidence and rules.

Section 5453. Section 64. Before the assessment of the property of any express, telegraph or telephone company is determined, any company or person interested shall have the right, on written application to appear before the commission and be heard in the matter of the valuation of the property of any company for taxation.

Section 5456. Section 67. The value of the property of telegraph and telephone companies of this state, after deducting the value of the real estate, shall be apportioned by the commission among the several counties through or into which the lines of such telegraph or telephone companies run, so that to each county shall be apportioned such part of the entire valuation as will equalize the relative value of the property of the company therein, in proportion to the whole value of the property of the company in the state, and in the proportion that the length of the lines of the wire owned by the company in the county, bears to the whole length of the lines of wire in all the counties in the state, and to each city, village and taxing district, or part thereof, therein.

Section 5457. Section 68. The value of the property of express companies shall be apportioned by the commission among the several counties in which the company does

business, in the proportion that the gross receipts in each county, bear to the entire gross receipts in all the counties in the state, and to each city, village and taxing district, or part thereof, therein.

(The last preceding group of sections constitutes a re-enactment of what was known as the "Nichols Law," referred to in the briefs. See Adams Express Co. v. Ohio State Auditor, supra.)

Section 5460. Section 71. Public utilities shall not be required to make returns under, nor be governed by the provisions of section fifty-four hundred and four, fifty-four hundred and five and fifty-four hundred and six of the General Code.

Section 5462. Section 73. Annually, between the first and thirty-first days of May, every sleeping car, freight line and equipment company, doing business or owning cars which are operated in this state, shall under the oath of the person constituting such company, if a person, or under the oath of the president, secretary, treasurer, superintendent or chief officer in this state of such association or corporation, if an association or corporation, make and file with the commission a statement in such form as the commission may prescribe.

Section 5465. Section 76. On the first Monday in July, the commission shall ascertain and determine the amount and value of the proportion of the capital stock of sleeping car, freight line and equipment companies, representing capital and property of such companies owned and used in this state, and in so determining, shall be guided in each case by the proportion of the capital stock of the company representing rolling stock, which the miles of railroad over which such company runs cars, or its cars

are run in this state, bear to the entire number of miles in this state and elsewhere over which such company runs cars, or its cars are run, and such other rules and evidence as will enable the commission to determine, fairly and equitably, the amount and value of the capital stock of such company representing capital and property owned and used in this state.

Section 5468. Section 79. On the first Monday in August of each year, the commission shall certify such amount to the auditor of state, who shall charge a sum in the nature of an excise tax, to be collected from each sleeping car, freight line and equipment company, doing business or owning cars which are operated in this state, to be computed by taking one and two-tenths per cent. of the amount fixed by the commission as the value of the portion of the capital stock representing the capital and property of each company owned and used in this state.

Section 81. Each public utility, except express, telegraph and telephone companies, and street, suburban and interurban railroad and railroad companies, doing business in this state, shall, annually, on or before the first day of August, and each street, suburban and interurban railroad and railroad company, shall, annually, on or before the first day of September, under the oath of the person constituting such company, if a person, or under the oath of the president, secretary, treasurer, superintendent or chief officer in this state, of such association or corporation, if an association or corporation, make and file with the commission a statement in such form as the commission may prescribe.

Section 5472. Section 83. In the case of each railroad company, such statement shall also contain the entire

gross earnings, including all sums earned or charged, whether actually received or not, for the year ending on the thirtieth day of June next preceding, from whatever source derived, for business done within this state, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government. Such statement shall also contain the total gross earnings of such company for such period in this state from business done within this state.

Section 5474. Section 85. In the case of all such public utilities except railroad, street, suburban and interurban railroad companies, such statement shall also contain the entire gross receipts of the company, including all sums earned or charged, whether actually received or not, from whatever source derived, for business done within this state for the year next preceding the first day of May, including the company's proportion of gross receipts for business done by it within this state in connection with other companies, firms, corporations, persons or associations, but this shall not apply to receipts from interstate business, or business done for the federal government. Such statement shall also contain the total gross receipts of such company for such period in this state from business done within this state.

Section 5475. Section 86. On the first Monday of September the commission shall ascertain and determine the entire gross receipts of each electric light, gas, natural gas, pipe line, waterworks, messenger or signal, union depot, heating, cooling and water transportation company for business done within this state, for the year then next preceding the first day of May, and of each express, telegraph and telephone company for business done within this state

for the year ending on the thirtieth day of June, excluding therefrom, as to each of the companies named in this section, all receipts derived wholly from interstate business or business done for the federal government.

Section 5477. Section 88. On the first Monday of October, the commission shall ascertain and determine the gross earnings as herein provided, of each railroad company whose line is wholly or partially within this state, for the year ending on the thirtieth day of June next preceding, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government. The amount so ascertained by the commission shall be the gross earnings of such railroad company for such year.

Section 5478. Section 89. On the first Monday of October, the commission shall ascertain and determine the gross earnings, as herein provided, of each street, suburban and interurban railroad company whose line is wholly or partially within this state, for the year ending on the thirtieth day of June next preceding, excluding therefrom, as to each of the companies named in this section, all earnings derived wholly from interstate business or business done for the federal government. The amount so ascertained by the commission shall be the gross earnings of such street, suburban or interurban railroad company for such year.

Section 5479. Section 90. Before the gross receipts or earnings of any such public utility are determined, any company, or person interested, shall have the right, on written application, to appear before the commission and be heard in the matter of such determination.

173

Section 5480. Section 91. Between the dates herein fixed for the determination of the amount of the gross receipts or earnings of any such public utility, and the dates herein fixed for the certification to the auditor of state of such amount, as provided in this act, the commission may, on the application of any person or company interested, or on its own motion, review and correct its findings.

Section 5481. Section 92. On the first Monday of October the commission shall certify to the auditor of state, the amount of the gross receipts so determined, of electric light, gas, natural gas, pipe line, waterworks, express, telegraph, telephone, messenger or signal, union depot, heating, cooling and water transportation companies, for the year covered by its annual report to the commission, as required in this act.

Section 5482. Section 93. On the first Monday of November the commission shall certify to the auditor of state the amount of the gross earnings so determined of each street, suburban and interurban railroad and railroad company for the year ending on the thirtieth day of June next preceding.

Section 5483. Section 94. In the month of October, annually, the auditor of state shall charge, for collection from each electric light, gas, natural gas, waterworks, telephone, messenger or signal, union depot, heating, cooling and water transportation company, a sum in the nature of an excise tax, for the privilege of carrying on its intrastate business, to be computed on the amount so fixed and reported by the commission as the gross receipts of such company on its intrastate business for the year covered by its annual report to the commission, as required in this act, by taking one and two-tenths per cent. of all such gross

receipts, which tax shall not be less than ten dollars in any case.

Section 5484. Section 95. In the month of November, the auditor of state, shall charge, for collection from each street, suburban and interurban railroad company, a sum in the nature of an excise tax, for the privilege of carrying on its intrastate business, to be computed on the amount so fixed and reported to him by the commission as the gross earnings of such company on its intrastate business for the year covered by its annual report to the commission, as required in this act, by taking one and two-tenths per cent. of all gross earnings, which tax shall not be less than ten dollars in any case.

Section 5485. Section 96. In the month of October, the auditor of state shall charge for collection, from each express and telegraph company, a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported to him by the commission as the gross receipts of such company on its intrastate business for the year covered by its annual report to the commission, as required in this act, by taking two per cent. of all such gross receipts, wihch tax shall not be less than ten dollars in any case.

Section 5486. Section 97. In the month of November, the auditor of state shall charge for collection, from each railroad company, a sum in the nature of an excise tax, for the privilege of carrying on its intrastate business, to be computed on the amount so fixed and reported to him by the commission, as the gross earnings of such company on its intrastate business for the year covered by its annual report to the commission, as required in this act, by tak-

ing four per cent. of all such gross earnings, which tax shall not be less than ten dollars in any case.

Section 5487. Section 98. In the month of October, the auditor of state shall charge for collection, from each pipe line company, a sum in the nature of an excise tax, for the privilege of carrying on its interstate business, to be computed on the amount so fixed and reported to him by the commission, as the gross receipts of such company on its intrastate business for the year covered by its annual report to the commission, as required in this act, by taking four per cent. of all such gross receipts, which tax shall not be less than ten dollars in any case.

Section 5491. Section 102. All taxes received by the treasurer of state, under the provisions of this act, shall be credited to the general revenue fund. * * *

Section 5495. Section 106. Between the first day of May and the first day of July, 1911, and annually thereafter during the month of May, each corporation, organized under the laws of this state, for profit, shall make a report, in writing, to the commission, in such form as the commission may prescribe.

Section 5498. Section 109. Upon the filing of the report, provided for in the last three preceding sections, the commission, after finding such report to be correct, shall, on the first Monday of July, determine the amount of the subscribed or issued and outstanding capital stock of each such corporation. On the first Monday in August, the commission shall certify the amount so determined by it to the auditor of state, who shall charge for collection, on or before August fifteenth, as herein provided, from such corporation, a fee of three twentieths of one per cent. upon its subscribed or issued and outstanding capital

stock, which fee shall not be less than ten dollars in any case. Such fee shall be payable to the treasurer of state on or before the first day of the following October.

Section 5499. Section 110. Annually, during the month of July, each foreign corporation for profit, doing business in this state, and owning or using a part or all of its capital or plant in this state, and subject to compliance with all other provisions of law, and in addition to all other statements required by law, shall make a report in writing to the commission in such form as the commission may prescribe.

Section 5502. Section 113. Upon the filing of the report, provided for in the last three preceding sections, the commission, from the facts thus reported and any other facts coming to its knowledge bearing upon the question, shall, on the first Monday in September, determine the proportion of the authorized capital stock of the company represented by its property and business in this state. On the first Monday of October, the commission shall certify the amount of the proportion of the authorized capital stock of each such company represented by its property and business in this state, as determined by it, to the auditor of state.

Section 5503. Section 114. On or before October fifteenth, the auditor of state shall charge for collection, as herein provided, annually, from such company, in addition to the initial fees otherwise provided for by law, for the privilege of exercising its franchises in this state, a fee of three-twentieths of one per cent. upon the proportion of the authorized capital stock of the corporation represented by property owned and used and business transacted in this state, which fee shall not be less than ten dollars in

any case. Such fee shall be payable to the treasurer of state on or before the first day of the following December.

Section 5506. Section 117. The fees, taxes and penalties, required to be paid by this act, shall be the first and best lien on all property of the public utility or corporation, whether such property is employed by the public utility or corporation in the prosecution of its business or is in the hands of an assignee, trustee or receiver for the benefit of the creditors and stockholders thereof.

Section 5518. Section 129. An incorporated company, whether foreign or domestic, owning or operating a public utility in this state, and as such required by law to file reports with the tax commission and to pay an excise tax upon its gross receipts or gross earnings as provided in this act, and insurance, fraternal beneficial, building and loan, bond investment and other corporations, required by law to file annual reports with the superintendent of insurance, shall not be subject to the provisions of sections one hundred and six to one hundred and fifteen, inclusive, of this act.

Section 5520. Section 131. The mere retirement from business or voluntary dissolution of the domestic or foreign corporation, without filing the certificate, provided for in sections eleven thousand nine hundred and seventy-four, eleven thousand nine hundred and seventy-five and eleven thousand nine hundred and seventy-six of the General Code, shall not exempt it from the requirements to make reports and pay fees or taxes in accordance with the provisions of this act.

Section 5603. Section 136. The commission may increase the value of the shares of incorporated banks, and also the shares of incorporated banks, the capital stock of

which is divided into shares, each of which shares is an aliquot part of the capital so divided, and of the property representing the capital employed by unincorporated banks, the capital stock of which is not divided into shares.

* * *

Section 5542-8. Section 141. On or before the first Monday of November, nineteen hundred and fourteen, and every fourth year thereafter, each county auditor shall make and transmit to the commission an abstract of the real property of each taxing district in his county, in which he shall set forth the value thereof, as returned by the assessors, with such additions as have been made thereto.

Section 5442-10. Section 142. When the commission has determined the true value of the real property in the several taxing districts or subdivisions thereof it shall transmit to each county auditor a statement of the amount to be added or deducted from the valuation of the real property of each taxing district or subdivision thereof in his county, specifying the amount to be added to or deducted from the valuation of the real property of each of the several taxing districts or subdivisions thereof.

(There is an omission here of two sections, enacted in a separate law, which in effect gives to the Tax Commission the power to act as a state board of equalization.)

Section 5617-1. Section 146. The commission shall require county auditors to place upon the tax duplicate any property which may be found, for any reason, to have escaped assessment and taxation.

Section 5617-2. Section 147. The commission may raise or lower the assessed value of any real or personal property, first giving notice to the owner or owners thereof fixing a time and place for hearing any person or persons

interested to the end that the assessment laws of the state may be equitably administered.

Section 5617-3. Section 148. For the purpose of protecting the public interest, the commission is authorized to appear and upon its application entitled to be heard in any court or tribunal, in any proceeding involving the appraisement, valuation or equalization thereof, of property for purposes of taxation, or the assessment or collection of taxes. It shall be the duty of the clerk of any court of record in this state, to immediately transmit to the commission, by registered letter, a copy of the petition filed in such action, and charge the fee therefor in the costs.

Section 5617-4. Section 149. The commission may remit taxes and penalties thereon, found by it to have been illegally assessed, and such penalties as have accrued, or may accrue, in consequence of the negligence or error of an officer required to perform a duty relating to the assessment of property for taxation, or the levy or collection of taxes. It may correct an error in an assessment of property for taxation or in the duplicate of taxes in a county, but its power under this section, shall not extend to taxes levied under the provisions of subdivision two of chapter fifteen or title two, part second, of the General Code.

Section 5617-6. Section 151. The commission may receive complaints and examine into all cases where it is alleged that property subject to taxation has not been assessed or has been fraudulently or for any reason improperly or unfairly assessed, or the law, in any manner, evaded or violated.

Section 5617-7. Section 152. The commission may cause to be instituted proceedings to remedy improper or negligent administration of the taxation laws of the state.

Section 160. The sections of this act, and every part of such sections, are hereby declared to be independent sections and parts of sections and the holding of any section or part thereof to be void or ineffective shall not affect any other section or part thereof.

102 Ohio Laws, 266.

An act to amend Sections 7575, 7924, 7925, 7926, 7927, 7986, 5649-2, 5649-3 and 5649-5 of the General Code, and to supplement Sections 5649-3 and 5649-5 by supplementary sections to be known as Sections 5649-3a, 5649-3b, 5649-3c, 5649-3d and 5649-3e and 5649-5a and 5649-5b of the General Code, relating to the maximum tax rate which may be levied in a taxing district, and to remove certain penalties for improper valuation so as to secure hereafter a fair and equitable valuation of property for taxation.

Sec. 5649-2. Except as otherwise provided in section 5649-4 and section 5649-5 of the General Code, the aggregate amount of taxes that may be levied on the taxable property in any county, township, city, village, school district or other taxing district, for the year 1911 and any year thereafter, including taxes levied under authority of section 5649-1 of the General Code, and levies for state, county, township, municipal, school and all other purposes, shall not in any one year exceed in the aggregate the total amount of taxes that were levied upon the taxable property therein of such county, township, city, village, school district or other taxing district, for all purposes in the year 1910, provided, however, that the maximum rate of taxes that may be levied for all purposes, upon the taxable property therein, shall not in any one year exceed ten mills on each dollar of the tax valuation of the taxable property of

such county, township, city, village, school district or other taxing district for that year, and such levies in addition thereto for sinking fund and interest purposes as may be necessary to provide for any indebtedness heretofore incurred or any indebtedness that may hereafter be incurred by a vote of the people.

Section 5649-5b. * * * In no case shall the combined maximum rate for all taxes levied in any year in any county, city, village, school district or other taxing district, under the provisions of this and the two preceding sections and sections 5649-2 and 5649-3 of the General Code as herein enacted, exceed fifteen mills.

## APPENDIX B.

### *Abstract of History of Excise and Franchise Tax Legislation in Ohio.*

*92 Ohio Laws, 79.*

"An act providing for an excise tax on electric light, gas, natural gas, pipe line, waterworks, street railroad, railroad and messenger or signal companies. (Passed March 19, 1896.)

Section 1. *Be it enacted by the General Assembly of the State of Ohio,* That any person or persons, joint stock association, or corporation, wherever organized or incorporated, when engaged in the business of supplying electricity for light, heat or power purpose to consumers within this state, shall be deemed to be an electric light company; when engaged in the business of supplying artificial gas for lighting or heating purposes to consumers

within this state, shall be deemed to be a gas company; when engaged in the business of supplying natural gas for lighting, heating, or power purposes to consumers within this state, shall be deemed to be a natural gas company; when engaged in the business of transporting natural gas or oil through pipes or tubing, either wholly or partially, within this state, shall be deemed a pipe-line company; when engaged in the business of supplying water, through pipes or tubing or in a similar manner, to consumers within this state, shall be deemed to be a waterworks company; when engaged in the business of operating a street, suburban or interurban railroad, either wholly or partially within this state, whether the cars used in such business be propelled by animal, steam, cable, electric, or other motor, shall be deemed to be a street railroad company; when engaged in the business of operating a railroad, either wholly or partially within this state, whether on rights of way acquired and held exclusively by such company or otherwise, shall be deemed to be a railroad company; when engaged in the business of supplying messengers or of signaling or calling by electric apparatus, or in similar manner, for any purpose shall be deemed to be a messenger or signal company.

(Sections 2 to 5, inclusive, of this act, provide the machinery for collecting from the subjects of taxation enumerated in the first section an excise tax on gross receipts and gross earnings, at the uniform rate of one-half of one per cent. We quote excerpts from some of these sections, relating to railroad companies.)

Section 3. * * * The board shall further proceed to ascertain and determine, on or before the first Monday in October, the gross earnings from its operation within

Ohio of each railroad company whose line is wholly or partially within this state, for the year then next preceding the thirtieth day of June, and the amount ascertained by said board shall be held and deemed to be "the gross earnings of such railroad company from its operation within Ohio" for the year under consideration. In ascertaining the gross earnings from its operation within Ohio of a railroad company whose line lies partly within and partly without this state, the gross earnings from its operation of the entire line or system, shall be divided by the total number of miles operated to obtain the average gross earnings per mile, and the gross earnings from the operation within this state shall be taken to be the average gross earnings per mile multiplied by the number of miles operated within this state. * * *

Section 5. * * * It shall be the duty of the auditor of state, in the month of November, annually, to charge and collect * * * from each railroad company doing business in this state a sum in the nature of an excise tax to be computed by taking one-half of one per cent. of the amount fixed by the state board of appraisers and assessors as the gross earnings from its operation within Ohio of such company, for the year then next preceding the thirtieth day of June, and certified to the auditor of state. Provided, nothing contained in this act shall exempt or relieve electric light, gas, natural gas, pipe line, waterworks, street railroad, railroad, and messenger or signal companies from the assessment and taxation of their tangible property in the manner authorized and provided by law. All taxes collected by the auditor of state under the provisions of this act, shall be paid into the state treasury and be credited to the general revenue fund.

*95 Ohio Laws, 124.*

"An act to require corporations to file annual reports with the secretary of state and to pay annual fees therefor. (Passed April 11, 1902.)

Section 1. Every corporation organized under the laws of this state, for profit, shall make a report in writing to the secretary of state, annually, during the month of May, in such form as the secretary of state may prescribe, containing the following facts. * * *

Upon the filing of such report, the secretary of state shall charge and collect from such corporation a fee of one-tenth of one per cent. upon the subscribed or issued and outstanding capital stock of said corporation, and to be not less than ten dollars in any case.

Section 2. Every foreign corporation for profit, now or hereafter doing business in this state, and owning or using a part or all of its capital or plant in this state, and subject to compliance with the provisions of section 148c of the Revised Statutes of Ohio, shall in addition to the statements required by section 148c and 148d, Revised Statutes of Ohio, make a report in writing to the secretary of state, annually, during the month of September, in such form as the secretary of state may prescribe, containing the following facts:

* * * * *

9. The value of the property owned and used by the company in Ohio, where situated, and the value of the property owned and used outside of Ohio and where situated.

* * * * *

Upon the filing of such report the secretary of state, from the facts thus reported and any other facts coming

to his knowledge bearing upon the question, shall determine the proportion of the authorized capital stock of the company represented by its property and business in Ohio, and shall charge and collect from such company, in addition to the initial fees provided for in sections 148c and 148d of the Revised Statutes of Ohio, for the privilege of exercising its franchises in Ohio, annually, one-tenth of one per cent. upon the proportion of the authorized capital stock of the corporation represented by property owned and used and business transacted in Ohio, and to be not less than ten dollars in any case.

Section 3. Every corporation organized under the laws of this state, not for profit, and having no capital stock, shall make a report in writing to the secretary of state, annually, during the month of December, in such form as the secretary of state may prescribe, containing the following facts:

* * * * *

Upon the filing of such report the secretary of state shall charge and collect the following fees: For all corporations organized for the purposes mentioned in section 148a, paragraph 4, of the Revised Statutes of Ohio, ten dollars; for all corporations organized for the purposes mentioned in section 148a, paragraph 5, one dollar.

Section 4. Upon the filing of the report and the payment of the fee provided for in the preceding sections of this act, the secretary of state shall make out and deliver to such corporation a certificate of the compliance by such corporation with the preceding sections and the payment of the annual fee therein provided for.

The secretary of state shall make a report monthly to the auditor of state of the annual fees collected under this

act, and shall pay the same into the state treasury to the credit of the general revenue fund.

Section 5. In case any corporation required to file the report and pay the fee prescribed in sections 1 and 2 of this act shall fail or neglect to make such report or pay such fee within the period prescribed in said sections, respectively, such corporation shall be subject to a penalty of five hundred dollars, and an additional penalty of one hundred dollars per day for each day's omission after the time limited in this act for filing such report and paying such fee. Such penalty and the annual fee or fees required to be paid by the provisions of sections 1 and 2 of this act may be recovered by an action in the name of the state, and on collection paid into the treasury to the credit of the general revenue fund.

The attorney general, on request of the secretary of state, shall institute such action in the Court of Common Pleas of Franklin county, or of any county in the state in which such corporation has an office or place of business, as he prefers.

The governor, secretary of state and attorney general, upon good cause shown, may, in their discretion, remit the penalty on any part thereof prescribed in this section.

In case any corporation required to file the report and pay the fee prescribed in section 3 of this act shall fail or neglect to make such report or pay such fee for three months after the expiration of the time limited by this act, and such default is willful and intentional, the attorney general shall, on the request of the secretary of state, bring an action in the Court of Common Pleas of Franklin county, or of any county in this state in which such corporation is located, to forfeit and annul the charter of such corpora-

tion, and if such court is satisfied that such default is willful and intentional, the court is authorized to revoke and annul such charter.

Section 7. Provided that electric light, gas, natural gas, waterworks, pipe line, street railroad, electric interurban railroad, steam railroad, messenger, union depot, express, freight line, sleeping car, telegraph, telephone and other corporations, required by law to file annual reports with the auditor of state, and insurance, fraternal beneficial, building and loan, bond investment, and other corporations required by law to file annual reports with the superintendent of insurance, shall not be subject to the provisions of the preceding sections of this act. Provided, further, that a corporation shall not be required to file its first annual report under this act until the proper month hereinbefore provided for the filing of such report, next following the expiration of six months from the date of its incorporation or admission to do business in this state.

Section 8. Every domestic corporation, in case of dissolution, revocation of charter or abandonment of its corporate purposes, shall file with the secretary of state a certificate of such dissolution, revocation of charter or abandonment; in case of dissolution or abandonment by voluntary action of the corporation, such certificate shall be signed by the president and secretary of the corporation; in case of dissolution, or revocation of charter by action of a competent court, such certicate shall be signed by the clerk of the court entering the decree of dissolution or revocation. The fees for making and filing such certificate with the secretary of state shall be taxed in the costs in favor of the party paying the same, and shall have the same priority as other costs in the dissolution proceedings.

Every foreign corporation when it shall retire from business in this state is hereby required to file with the secretary of state a certificate to that effect, signed by the president and secretary of the corporation.

* * * * *

The mere retirement from business or voluntary dissolution of a domestic or foreign corporation without having filed the certificate provided for in this section, shall not exempt it from the requirements to make reports and pay fees in accordance with the provisions of this act.

*95 Ohio Laws, 136.*

"An act to amend sections 2780-17, 2780-18, 2780-19, 2780-20, 2780-21 and 2780-22, and to supplement said section 2780-22 by supplementary section 2780-23 of the Revised Statutes of Ohio. (Passed April 15, 1902.)

Section 2789-17. That any person or persons, joint stock association or corporation, wherever organized or incorporated, when engaged in the business of supplying electricity for light, heat or power purposes to consumers within this state, shall be deemed to be an electric light company; when engaged in the business of supplying artificial gas for lighting or heating purposes to consumers within this state, shall be deemed to be a gas company; when engaged in the business of supplying natural gas for lighting, heating or power purposes to consumers within this state, shall be deemed to be a natural gas company; when engaged in the business of transporting natural gas or oil through pipes or tubing, either wholly or partially, within this state, shall be deemed to be a pipe line company; when engaged in the business of supplying water, through pipes or tubing, or in a similar manner, to consumers within this state, shall be deemed to be a water-

works company; when engaged in the business of operating a street, suburban or interurban railroad, either wholly or partially within this state, whether the cars used in such business be propelled by animals, steam, cable, electricity, or other motor shall be deemed to be a street, suburban or interurban railroad company; when engaged in the business of conveying to, from or through this state, or any part thereof, money, packages, gold, silver, plate or other article, by express, not including the ordinary lines of transportation of merchandise and property in this state, shall be deemed to be an express company; when engaged in the business of transmitting to, from, through, or in this state, telegraphic messages, shall be deemed to be a telegraph company; when engaged in the business of transmitting to, from, through, or in this state, telephonic messages shall be deemed to be a telephone company; when engaged in the business of supplying messengers or of signaling or calling by electrical apparatus, or in similar manner, for any purpose, shall be deemed to be a messenger or signal company; when engaged in the business of operating a union depot or station for railroad purposes, shall be deemed to be a union depot company; when engaged in the business of operating a railroad, either wholly or partially within this state, whether on rights of way acquired and held exclusively by such company or otherwise, shall be deemed to be a railroad company.

Section 2780-18. Every electric light, gas, natural gas, pipe line, waterworks, street, suburban or interurban railroad, express, telegraph, telephone, messenger or signal, and union depot company, defined in section (1) one hereof, doing business in this state shall, annually, between the first and thirty-first days of May, and every such railroad

company shall, annually, on or before the first day of September, under the oath of the person constituting such company, if a person, or under the oath of the president, secretary, treasurer, superintendent or chief officer in this state, of such association or corporation, if an association or corporation, make and file with the auditor of state a statement, in such form as the auditor of state may prescribe, containing the following facts:

* * * * *

Sixth. In the case of express companies the entire receipts (including all sums earned or charged, whether actually received or not) for business done within this state of each agent of such company doing business in this state (giving the name of the office) for the year then next preceding the first day of May, for and on account of such company, including its proportion of gross receipts for business done by such company within this state in connection with other companies; also, the total amount of such receipts for business done within this state.

Seventh. In the case of telegraph and telephone companies, the entire gross receipts (including all sums earned or charged, whether actually received or not) for the year then next preceding the first day of May, from whatever source derived, whether messages, telephone tolls, rentals or otherwise, for business done within this state of each office within this state (giving the name of the office) and the total gross receipts of the company for such period in Ohio from business done within Ohio.

Eighth. In the case of each railroad situated wholly within Ohio, in gross earnings from its operation, in the case of each railroad located partly within and partly without Ohio, the gross earnings from the operation of the

entire line, for the year ending the thirtieth day of June next preceding, with the miles of line within Ohio, and the miles of line without Ohio.

Ninth. In the case of each street, suburban or interurban railroad situated wholly within Ohio, the gross earnings from its operation and in the case of each street, suburban or interurban railroad located partly within and partly without Ohio, the gross earnings from the operation of the entire line, for the year ending the first day of May next preceding, with the miles of line within Ohio, and the miles of line without Ohio.

Tenth. In the case of companies, other than express, street, suburban and interurban railroads, and railroads, the entire gross receipts of the company (including all sums earned or charged, whether actually received or not) for business done within this state for the year then next preceding the first day of May, including the company's proportion of gross receipts for business done by it within this state in connection with other companies.

* * * * *

Section 2780-19. The auditor of state, treasurer of state, attorney general and secretary of state shall constitute a board, named the state board of appraisers and assessors, of which board the auditor of state shall be ex-officio president. * * * The board shall proceed to ascertain and determine, on or before the second Monday in July, the entire gross receipts of electric light, gas, natural gas, pipe line, waterworks, express, telegraph, telephone, messenger or signal, and union depot companies for business done within Ohio, for the year then next preceding the first day of May, and the amounts ascertained by said board shall, in such instance, be held and deemed to be "the gross

receipts of such electric light, gas, natural gas, pipe line, waterworks, express, telegraph, telephone, messenger or signal and union depot company, for business done within Ohio for the year under consideration. The board shall further proceed to ascertain and determine, on or before the first Monday in October, the gross earnings from its operation within Ohio, of each railroad company whose line is wholly or partially within this state, for the year then next preceding the thirtieth day of June, and the amount ascertained by said board shall be held and deemed to be "the gross earnings of such railroad company for its operation within Ohio" for the year under consideration. In ascertaining the gross earnings from its operation within Ohio of a railroad company whose line lies partly within and partly without this state, the gross earnings from its operation of the entire line or system, shall be divided by the total number of miles operated to obtain the average gross earnings per mile, and the gross earnings from the operation within this state shall be taken to be the average gross earnings per mile multiplied by the number of miles operated within this state. The board shall further proceed to ascertain and determine, on or before the second Monday in July, the gross earnings from its operation within Ohio of each street, suburban or interurban railroad company whose line is wholly or partially within this state, for the year then next preceding the first day of May, and the amount so ascertained by said board shall be held and deemed to be "the gross earnings of such street, suburban or interurban railroad company from its operation within Ohio" for the year under consideration. In ascertaining the gross earnings from its operation within Ohio of a street, suburban or

interurban railroad company whose line lies partly within and partly without this state, the gross earnings from its operation of the entire line or system, shall be divided by the total number of miles operated to obtain the average gross earnings per mile, and the gross earnings from the operation within this state shall be taken to be the average gross earnings per mile, multiplied by the number of miles operated within this state.

Section 2780-21. * * * It shall be the duty of the auditor of state, in the month of November, annually, to charge and collect from each electric light, gas, natural gas, pipe line, waterworks, express, telegraph, telephone, messenger or signal, and union depot company, doing business in this state, a sum, in the nature of an excise tax to be computed by taking one per centum of the amount fixed by the state board of appraisers and assessors as the gross receipts of such company for business done within the state of Ohio for the year then next preceding the first day of May, and certified to the auditor of state; and from each street, suburban or interurban railroad company doing business in this state, a sum in the nature of an excise tax, to be computed by taking one per cent. of the amout fixed by the state board of appraisers and assessors as the gross earnings from its operation within Ohio of such company for the year then next preceding the first day of May and certified to the auditor of state; and from each railroad company doing business in this state a sum in the nature of an excise tax, to be computed by taking one per cent. of the amount fixed by the state board of appraisers and assessors as the gross earnings from its operation within Ohio of such company for the year then next preceding the thirtieth

day of June, and certified to the auditor of state. Provided, nothing contained in this act shall exempt or relieve electric light, gas, natural gas, pipe line, waterworks, street, suburban or interurban railroad, express, telegraph, telephone, messenger or signal, union depot and railroad companies from the assessment and taxation of their tangible property in the manner authorized and provided by law. All taxes collected by the auditor of state under the provisions of this act, shall be paid into the state treasury, and be credited to the general revenue fund. * * * *

*101 Ohio Laws, 399.*

"An Act to create a tax commission, define its powers and duties, and to repeal Sections 258, 5415 to 5431, inclusive, 5445 to 5542, inclusive, and 5002 to 5617, inclusive, of the General Code.

(Passed May 10, 1910.)

Section 1. A tax commission is hereby created, to be known as the tax commission of Ohio, to be composed of three commissioners, electors of the state, not more than two of whom at any time shall be of the same political party. * * *

(The remainder of this act is so very similar to the act of May 31, 1911, that it would be superfluous for us to quote from it. Its citation will, it is believed, be sufficient for the court's purpose, when coupled with the statement that the act of 1911 is a mere revision of this act, and that the exact scheme of taxation embodied in the present law of Ohio was first adopted in 1910.)

## APPENDIX C.

Certified copies of the decisions of the Common Pleas Court and Court of Appeals of Franklin County, Ohio, in the case of State of Ohio vs. Ohio Traction Company.

The State of Ohio, Plaintiff, vs. The Ohio Traction Company, Defendant. No. 62552.

KINKEAD, J.

This action is brought to recover $15,588.23 against the defendant, such sum being in the nature of an excise tax for the privilege of carrying on intrastate business, and penalty of $2033.25.

The answer of the defendant avers that the report it filed with the tax commissioner showed its total receipts for the year covered to be $1,130,548.00; that $254,003 represented gross earnings for the year ending June 30th for business done by defendant in the operation of its street railroad, excluding business done for the federal government.

The statement also contained receipts from sources other than the operation of its street railroad, viz:

Rents of buildings and other real estate, $125,063.
Dividends on securities owned by defendant, $107,145.
Income derived from subsidiary companies, $643,371.

The income from rents were derived by virtue of defendants' ownership of a certain office building in the city of Cincinnati, which is on the tax duplicate of that county and then assessed as real estate and improvements, and the taxes so assessed are paid.

That the item of income from dividends on securities owned by defendant is income from subsidiary companies

received by defendant solely by virtue of its ownership of stock in other public utility corporations, each of which had made its statement, as required by law, of its gross earnings for the period covered by the statement by the defendant, and each of which public utility companies has paid its excise tax upon the gross earnings so reported and as determined by the tax commission of Ohio.

The answer avers that the statement by defendant of the gross earnings were made to the tax commission under protest against the assessment of any excise tax upon any part of the earnings of defendant other than those derived from the operation of its street railroad.

The answer sets forth that defendant made a tender of what it claimed to be due from it by way of an excise tax on the sum of $254,003, derived from the operation of its street railroad which was refused because the tax commission had determined the amount of its gross earnings which was subject to such excise tax at the sum of $1,129,582, and the tax thereon to be $13,554.98.

It is claimed that the assessment of an excise tax of one and two-tenths per cent. of the sum above stated, is without warrant at law because all of such receipts, excepting the sum of $254,003 derived exclusively from operating its street railroad, are receipts derivable from its ownership of property, and not from the business of operating a street, suburban or interurban railroad.

It is also claimed that the assessment of a tax upon such receipts against the class of owners operating street, suburban or interurban railroads, and not against all classes of property owners, is a discretionary and unconstitutional tax, and in violation of Art. 1, Secs. 1, 2 and 19 of the Constitution of Ohio.

It is forthermore claimed that a tax as levied is not levied by a uniform rule, in violation of Art. 12, Secs. 2 and 5 and of Art. 13, Sec. 4 of the Constitution of Ohio.

That a tax so levied is a taking of defendant's property without due process of law and without compensation and denies equal protection of its laws in violation of Art. 1, Sec. 19 of the Constitution of Ohio, and in violation of the Constitution of the United States, Art. 15, Sec. 15.

The plaintiff demurs to the answer claiming that it has made no legal defense.

The warrant for the assessment against defendant is found in the act amendatory of the tax commission law passed May 31, 1911, 102 O. L. 224.

This act requires: Interurban railroad companies to file with the tax commission a statement of its *entire gross earnings, from whatever source* derived, exclusive of those from interstate business or business done for the federal government. Sec. 84.

The tax commission shall certify to the auditor of state the amount of the gross earnings of each street, interurban railroad, Sec. 93.

The auditor shall charge, for collection from each street, suburban and interurban railroad company, a sum in the nature of an excise tax, for the privilege of carrying on its intrastate business, to be computed on the amount so fixed and reported by the commission as the gross earnings of such company on its intrastate business, etc., by taking one and two tenths per cent. of all gross earnings, Sec. 95.

The purpose and scheme of this mode of taxation will be conducive to an understanding of the different provisions having direct bearing on the question before us.

The law provides a scheme of taking "public utilities" for the privilege of exercising the corporate rights and privileges granted by the state.

It also provides a plan or system of reporting "all property owned or operated, or both" by corporation or individuals engaged in a business classed and defined as a public utility by such law (Sec. 44) Sec. 5420 Code.

It specifies what such statement shall contain, (Sec. 46) Sec. 5422. The statement is required so that the tax commission may secure a full and complete statement of all property owned, of all classes, so that it may be fully advised as to the "property owned or operated by a public utility, (Sec. 5419) and of the 'gross earnings' for business done by an incorporated company, engaged in the operation of a public utility." (Sec. 42.)

It defines the "gross earnings" as "the entire earnings for business done, * * * from the operation of any public utility, or incidental thereto, or in connection therewith," as "held to mean and include the entire earnings for business done by such company under the exercise of its corporate powers, whether from the operation of the public utility itself, or from any other business whatsoever." (Sec. 5418.)

It defines "property owned and operated by a public utility" as to include such utility's plant, etc., and all real estate necessary to the operation of the same, and "all other property, moneys and credits owned or operated, or both, * * * used in connection with or as incidental to the operation of the public utility," and "all the real estate, personal property, moneys and credits owned and held by such corporation within this state in the exercise of its corporate powers, or as incidental there-

to, whether such property, or any portion thereof, is used in connection with such public utility business or not. Sec. 5419.

The specific definition of "gross earnings" and of property owned or operated by a public utility, and the provision and requirements as to filing a statement, are for the clear and distinct purpose of enabling the commission to exercise the power of taxation conferred upon it, and for its guidance therein.

At the appointed time (Sec. 5423) the commission is required to "ascertain and assess, as its true value in money, all the *property* in this state of such public utility.

Certain directions are given for its guidance in determining the value of the property.

The *property* to be assessed "shall be all the property" as defined in Section 5419.

When the commission has determined the value and the apportionment of the property, it shall certify it to the respective county auditor where the same is located, where it is placed on the duplicate.

On the first Monday of October the commission shall ascertain and determine the gross earnings, of each street, suburban and interurban railroad company, Sec. 5478. And on the first Monday of November the commission certifies to the auditor of state the amount of the gross earnings (Sec. 93), upon which the auditor is required to charge for collection from each interurban railroad company, a sum in the nature of an excise tax, for the privilege of carrying on its intrastate business, to be computed on the amount so fixed and reported to him by the commission as the gross earnings on its intrastate busi-

ness, by taking one and two-tenths per cent. of all gross earnings, Sec. 5484.

This shows the entire scheme of taxation of such companies by way of excise tax, for the privilege of carrying on its intrastate business.

We are not concerned with the question of property tax, so far as the question is presented by the pleadings, although it may well be observed from what appears from them, and from a statement in the brief that the definition of property which such companies must report is broad enough to require a report of the Traction Building as one of its properties. It is not exactly part of its plant, although it is stated in the brief that the company uses it in part for its offices, and rents the balance.

If it is used in part for its offices it may be said to that extent to be "real estate necessary to the daily operations of the public utility."

If not that, it is real estate owned by the company as incidental to the exercise of its corporate powers. (Sec. 5419.)

The thought in connection with the reference to the property tax is that the Traction Building could have been reported as part of its real estate, but it would have been reported back to the county for taxation.

The further thought, by analogy, is that in respect to real estate of a different character, which is a necessary part of the plant of the utility, it is after valuation, certified to the county of its locality for taxation. And if perchance any part of the realty which is a necessary part of the plant, yields income by way of rentals, would it be claimed that because the real estate it made to bear its real estate tax, that therefore any income derived

therefrom as rental, shall not be computed as part of the gross earnings because to do so would be to doubly tax? Perhaps not.

It is conceded here that the Traction Building is taxed as real estate in Hamilton county, and that the tax upon it as such is paid, which therefore withdraws it from the province of the tax commission so far as this case is concerned, unless its income by way of rental is to be considered as part of its gross receipts. And on this hinges the controversy.

It is claimed that an income by way of rental from the building which pays its tax as realty should be exempt from the corporate excise tax on gross receipts on the business done, because it is the receipt of money in the capacity of owner of property, and not for the business of operating a railroad, and furthermore, that it is double taxation.

It is also claimed that it is unequal taxation because if an individual was operating the railroad, and owned the building as well, that he would not be compelled to embrace the rentals as part of the gross earnings of the public utility.

This law must be construed to determine whether the rentals shall be included in the gross earnings. And if the proper construction requires that such rentals shall be so computed, the next question is whether the law militates against constitutional rights.

True, legislation is to be construed in the light of the legislative history of the subject matter, and the manifest reason and intention must prevail, if at variance with the literal import of language used.

The policy of previous acts was to measure the excise tax by the gross earnings. But when the legislature came to enact one general law, embracing all the various laws and corporations taxed, in this manner, and bring them all within the jurisdiction of one administrative body —the Tax Commission of Ohio, we are to arrive at the construction of the various parts of the law by ascertaining its manifest purpose and meaning by its general aim, purpose and scheme as well as by its language.

The law provides two separate and distinct schemes of taxation, upon property, and upon the right to carry on business. With the latter only are we concerned.

The taxation upon the right to do business is assessed upon the gross earnings as reported by the tax commission. (Sec. 5484.)

And the definition of gross earnings in Section 5418 as meaning and including the entire earnings for business done from the operation of any public utility, or incidental thereto, or in connection therewith, for business done by such company under the exercise of its corporate powers, whether from the operation of the public utility, or from any other business done whatsoever, clearly covers the business done by defendant in its ownership and maintenance of the Traction Building, as well as in its ownership in the stocks.

This was to be the rule for making the report to the commission, and it was to be its guide and measure of its duty in certifying to the auditor the gross earnings for purposes of taxation.

This is the construction we place upon the law, and under it the conclusion is that it authorizes the commission to include in the gross receipts, not only the rents

from the building, but the dividends derived from the stocks which defendant holds in other companies.

It might be further added that while the charter may not cover the power of engaging in the business of maintaining and operating a traction building, its ownership is within the law incident to its business of operating a line of railroad. Its capital is invested in the building and its ownership is by virtue of its corporate power; and cannot be otherwise.

Being unlike an individual, it cannot have separate ownership and several responsibilities as may an individual.

The same rule applies to the ownership by defendant of stocks in other kindred companies. It has the power under the statute to own stock in kindred and non-competing corporations.

The ownership of such stock comes within the property definition of the statute "all other property, moneys and credits owned or operated, or both," though that is not the question raised. It is the inclusion of the dividends from the stocks owned as part of the gross earnings, which is held to be proper.

Such being the conclusion of the court, the remaining questions left for consideration are the constitutional objections.

It is claimed that the imposition of such tax as is made by the tax commission operates as a discrimination or unequal taxation between individuals and corporations.

It is the opinion of the court that this objection is not well founded in reason or in fact.

It is answered by stating that while corporations and natural persons are both classed as persons within the

meaning of the Constitution, they are in different classes when it comes to the application of the tax law under consideration.

Natural and artificial persons stand on the same basis as to all property, moneys and credits used in operating an interurban railroad, or which is used in connection with or as incidental to the operation of the public utility. (Sec. 5419.)

But when special privilege is given by the state to a corporation to act in a corporate capacity, such privilege may be taxed as it is beneficial, and a tax upon that privilege does not discriminate as between the individual and the corporation.

If an individual owned all the properties in question it could not be said that his ownership of the building, and of the stocks were owned by him in his capacity of operator of the interurban railroad.

The ownership by defendant of the stocks is by virtue of its corporate authority granted it by the state, as well as by authority of statute empowering it to own stock in other companies of kindred nature if not competing. It was stated in argument by counsel for defendant that this ownership of stock was almost the chief business of defendant.

This makes plain the fact that the income derived from the dividends from these stocks is within the letter of the statute as earnings for business done by such company under the exercise of its corporate powers from other business done by it, and in connection with its operation of a public utility, which it is the clear purpose to tax for carrying on its corporate business.

An individual could of course buy such stocks without any special privilege to do so; hence it is plain that an individual and corporation do not stand on the same footing; and to impose a tax upon the corporation for the privilege of doing corporate acts, does not in any wise discriminate between the two, or render the imposition of the tax unequal.

As to the ownership of the building the same logic and reason will apply, except that it does not appear by the pleadings whether defendant was authorized to carry on the business of owning, maintaining and operating an office building.

It must be assumed upon the submission that defendant has invested its capital in the building; and it must be assumed also that the item of rents are "earnings for business done by such company under the exercise of its corporate powers," from "other business done" by the company. Sec. 5418.

The claim that to tax the defendant on the rentals as part of its gross earnings when the real property itself is taxed as such, constitutes double taxation, is answered in the same manner as was the claim as to the stock.

The ownership by the defendant corporation has no relation to the taxation of the Cincinnati Street Railroad whose stock defendant owns.

The assessment of the latter company for the privilege of exercising corporate capacity in carrying on its business is entirely separate and distinct from the assessment of the excise tax against this defendant for carrying on whatsoever business it does.

The assessment of the real estate owned by defendant as a property tax is separate and distinct from the assess-

ment of an excise tax for exercising its corporate powers in carrying on the business of a public utility, "or from any other business done whatsoever" by it. (Sec. 5418.)

Under the scheme of taxation provided by law the purpose is to assess a property tax and excise. The power conferred by Section 5419 seems broad enough to authorize and empower the tax commission to assume jurisdiction over this property, because it is "real estate, * * * owned and held by such corporation within the state in the exercise of its corporate powers, or as incidental thereto, whether such property * * * is used in connection with such public utility business or not. (Sec. 5418.)

It will not be claimed that because the real estate of such corporation which is directly used in its business as a public utility, and which the commission is to value and certify to the county where located, is taxed as real estate, that to tax the *company* by way of excise tax on its gross earnings for the business it does by the use of such real estate, is double taxation.

Then is there any distinction between such ownership and use, and that of ownership of real estate by such company as an investment of its corporate assets, though the same be not designed to directly further or aid in the mere operation of the public utility?

The corporation was organized for profit, and in whatsoever business it engages by investment of its capital, it may be taxed on its gross earnings derived therefrom for the privileges conferred. And it cannot be heard to say in opposition to the assessment of the excise tax that a part of its gross earnings have arisen from *ultra vires* investments, so long as it receives the proceeds and enjoys the benefits thereof in its corporate capacity.

But there is no showing whatever by the pleadings that the ownership of the building and other real estate is not within its powers. It must be assumed that it is in the absence of anything to the contrary. No reference would be made to this point, if it had not been adverted to by counsel.

Whatever the rule my be in other states under other statutes the decision is that under our own statutes the conclusions which we have reached and stated on the questions, are clear.

The demurrer to the answer is therefore sustained. If defendant does not wish to plead further judgment may be entered on the petition.

The State of Ohio, Franklin County, ss.:

I, John B. Miles, clerk of the Court of Common Pleas within and for said county, do hereby certify that the above and foregoing is truly taken and copied from the original opinion now on file in my office.

Witness my hand and seal of said court, this 19th day of December, 1913.

(Seal.) John B. Miles, Clerk,
By Milo O. Coffrin, Deputy.

In the Court of Appeals of Franklin County, Ohio.

The Ohio Traction Company, Plaintiff in Error v. The State of Ohio, Defendant in Error. No. 3294.

DECISION

Rendered on Thursday the 6th day of Deember, A. D. 1913.

ALLREAD, J.

The action below was one to recover taxes assessed under the excise tax law of June 2nd, 1911 (102 O. L., 224), known as the "Hollinger Act."

The Ohio Traction Company owns and operates an interurban railway from Cincinnati, Ohio, to Hamilton, Ohio. It has reported the gross earnings of its railway under the excise tax law and tendered payment of the excise tax thereon.

The controversy arises over excise taxes assessed by the state upon income and receipts of the Traction Company from certain investments in dividend paying stocks and rent producing real estate, independent of the railway.

It is averred that the stocks represented in the investments are those of corporations paying the excise tax upon gross earnings.

A demurrer to the action of the Traction Company in the court below setting up the facts with respect to these investments was sustained and final judgment rendered upon the pleadings in favor of the state for the full amount of the tax.

The case is brought to this court upon petition in error.

In the act under consideration, the meaning of the term "gross earnings" appearing throughout the act, is made more definite, if not more comprehensive, by the following section:

> "Section 42. The term 'gross earnings' shall be held to mean and include the entire earnings for business done by any person or persons, firm or firms, copartnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, from the operation of any public utility, or incidental thereto, or in connection therewith. The gross earnings for business done by an incorporated company engaged in the operation of a public utility, shall be held to mean and include the entire earnings by such company for business done under the exercise of its corporate powers, whether from the operation of the public utility itself or from any other business done whatsoever."

By the force of this definition, the terms "gross earnings" includes not only the earnings of the utility, but the earnings and income for all business done within the scope of the company's charter. It is urged that the phrase "for business done" does not include owning and management of investments in stocks and real estate. We think, however, that this contention is not sound. The particular phraseology in Sec. 42 evidences a clear intent to tax all the earnings and income of the corporation from whatever source such earnings may be derived.

It is also contended that the act is unconstitutional as applied to investments not incidental to or connected with the utility itself because of discrimination.

The uniformity clause of the State Constitution does not prevent reasonable classification of legislative subjects.

So long as the owners of a utility choose to conduct it as individuals or as copartners the excise tax would naturally be confined to the earnings of the utility, but when the owners of the utility obtain the additional advantages of an incorporation to conduct that business and hold over independent investments, they are liable to such reasonable privilege taxes as the state may impose.

The excise law as founded upon the statutory definition of the term "gross earnings" contemplates a combination utility franchise and corporation franchise tax. The constitutionality of each when employed separately has been sustained and we can see no good reason why they may not be charged in combination under one charter.

The special contention is made that the excise tax should not be levied upon the dividends received upon stocks in other excise tax-paying corporations upon the argument that to do so would be double taxation.

It must be noted, however, that the excise tax now under conside. ion is for the privilege of holding and managing the investments in corporate form under the charter held by the plaintiff in error. The privilege for which the present excise tax is charged is distinct from that of the original company.

We think there is no constitutional infirmity in the state's right to levy a franchise tax upon the right of the plaintiff in error to hold the stocks, and we think that the legislative intent to include investments of this kind under the circumstances appearing in this case is clear.

It therefore follows that the judgment of the Court of Common Pleas in favor of the State should be affirmed.

The State of Ohio, Franklin County, ss.:

I, John B. Miles, clerk of the Court of Appeals, within and for said county, hereby certify that the above and foregoing is truly taken and copied from the original decision now on file in my office.

Witness my hand and the seal of said court, this 19th day of December, 1913.

(Seal.) John B. Miles, Clerk.

By Edw. T. Wells, Deputy.

## OHIO TAX CASES.

## OHIO RIVER AND WESTERN RAILWAY COMPANY *v.* DITTEY ET AL., AS THE TAX COMMISSION OF OHIO.

## MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY *v.* CREAMER ET AL., AS THE TAX COMMISSION OF OHIO.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Nos. 642, 643. Argued January 7, 1914.—Decided February 24, 1914.

Where the Federal jurisdiction does not depend upon diversity of citizenship but on Federal questions presented by the record, it extends to the determination of all questions presented irrespective of the disposition made of the Federal questions.

Where the statute specifically makes the tax a lien upon real estate and the bill alleges that enforcement of penalties would work irreparable injury, equity jurisdiction is properly invoked.

The Federal court may examine the opinion of the state court as well as the syllabus to ascertain the scope of the decision, notwithstanding the state rules of practice require the syllabus to be prepared by the judge preparing the opinion and to be confined to the points of law arising from the facts that have been determined.

The franchise of a railroad company is not necessarily to be regarded as valueless merely because its present earnings are not sufficient to pay more than high grade investments or even to pay operating expenses. *State Railroad Tax Cases*, 92 U. S. 575.

A state statute imposing a tax on railroads is not unconstitutional as denying equal protection of the law. The classification rests upon a reasonable and sufficient basis of distinction.

In the absence of a construction by the state court to that effect, the Federal court should not, if it can avoid doing so, place such a construction upon a state statute as would render it unconstitutional.

"Interstate," as used in a state tax statute, can fairly be construed as including all commerce other than "intrastate" when the evident purpose is to tax only the earnings subject to state taxation.

In a state statute imposing a tax on intrastate earnings, it is reasonable to suppose that the exclusion of interstate earnings from taxation extended to earnings from foreign commerce when another construction would render the statute unconstitutional.

The reasonableness of an excise or privilege tax, unless some Federal right is involved, is within the discretion of the state legislature.

Where a state statute does not on its face manifest a purpose to interfere with interstate commerce, this court cannot accept historical facts in connection with its enactment as evidence of a sinister purpose on the part of the legislature to evade obligations of the Federal Constitution, without a more substantial basis than appears in this case.

Double taxation does not exist in a legal sense unless the double tax is levied upon the same property within the same jurisdiction, and an excise tax measured on earnings from operating the property is not a double tax because the property itself is taxed.

These actions do not involve enforcement of penalties; and the penalty provisions of this statute if unconstitutional are severable by the express terms of the statute itself.

The Ohio statute of 1911 imposing an excise tax of four per cent. on gross intrastate earnings of railroad companies is not unconstitu-

tional, either as denying equal protection of the laws, or as depriving the railroads of their property without due process of law, or as interfering with interstate commerce, or as being an attempt to indirectly tax total gross receipts of the railroads, or as double taxation. 203 Fed. Rep. 537, affirmed.

THESE suits were brought in the United States District Court for the Southern District of Ohio (Eastern Division) by appellants, which are Ohio railroad corporations, to enjoin the certification and collection by appellees of a tax which the State was seeking to enforce upon the privilege of carrying on business in that State. This tax appellants claimed to be in violation of the due process and equal protection clauses of the Fourteenth Amendment and of the commerce clause of the Federal Constitution, and also of the preamble and sections two and nineteen of the Ohio constitution.

A restraining order was allowed by the District Court, and afterwards appellants' motions for temporary injunctions came on for hearing before three judges, of whom one was a circuit judge, pursuant to § 266 of the Judicial Code (36 Stat. 1162, c. 231), which went into effect shortly after the bills were filed. The two cases were argued and considered together, upon the facts averred in the bills, which were, for the purposes of the motions, conceded to be true by appellees, and, after consideration, the temporary injunctions were refused. 203 Fed. Rep. 537.

Appellants come direct to this court, under the same section of the Code.

The tax law in question, the validity of which is attacked generally, and also specially in its application to appellants, was enacted in its present form May 31, 1911. (102 Ohio Laws, 224.)

It created a tax commission, with defined powers, and prescribed various taxes, some upon property and others upon franchises and privileges, with sundry provisions, penal and otherwise, for the collection thereof. Some of

these taxes were new in Ohio law, others were carried over from previously existing statutes.

The tax here in question is limited in its operation to certain lines of quasi-public business, specifically named in the act and therein referred to as "public utilities," including railroads.

As applied to railroads, the act requires the filing with the Tax Commission, by each railroad doing business in the State, of a statement, on or before September 1, setting forth, among other things, its "entire gross earnings, including all sums earned or charged, whether actually received or not, for the year ending on the thirtieth day of June next preceding, from whatever source derived, for business done within this State, excluding therefrom all earnings derived wholly from interstate business or business done for the Federal Government. Such statement shall also contain the total gross earnings of such company for such period in this State from business done within this State." (Sections 81 and 83 of Act; §§ 5470 and 5472, General Code of Ohio.)

It is further provided that on the first Monday of October the Commission "shall ascertain and determine the gross earnings as herein provided, of each railroad company whose line is wholly or partially within this State, for the year ending on the thirtieth day of June next preceding, excluding therefrom all earnings derived wholly from interstate business or business done for the Federal Government. The amount so ascertained by the Commission shall be the gross earnings of such railroad company for such year." (Section 88 of Act; § 5477, Gen. Code.)

The act further provides that on the first Monday of November the Commission shall certify to the Auditor of State the amount of the "gross earnings so determined," (§ 93 of Act; § 5482, Gen. Code),—and that—"In the month of November, the Auditor of State shall charge for

collection, from each railroad company, a sum in the nature of an excise tax, for the privilege of carrying on its intrastate business, to be computed on the amount so fixed and reported to him by the Commission, as the gross earnings of such company on its intrastate business for the year . . . by taking four per cent. of all such gross earnings." (Section 97 of Act; § 5486, Gen. Code.). The tax is imposed equally and alike on corporations, partnerships, and individuals. (Section 39 of Act; § 5415, Gen. Code.)

*Mr. Robert J. King* and *Mr F. A. Durban* for appellants:

The Federal jurisdiction rests upon the presence of Federal questions.

The equity jurisdiction rests upon prevention of cloud upon real estate title, inadequacy of legal remedies, threatened irreparable damage and prevention of multiplicity of suits. Cooley on Taxation, p. 536; *Dows* v. *Chicago*, 11 Wall. 108, 112; *Shelton* v. *Platt*, 139 U. S. 591; *Ex parte Young*, 209 U. S. 123.

Under the constitution of Ohio, as construed by the Ohio Supreme Court in *Southern Gum Co.* v. *Laylin*, 66 Oh. St. 578, the legislature is without power to impose a privilege tax which is in excess of the value of the privilege taxed. Inasmuch as the admitted facts show the present tax upon appellants to wholly exceed such value, its exaction as to them violates the state constitution, and amounts to confiscation and a taking of their property without due process of law. *Adler* v. *Whitbeck*, 44 Oh. St. 539; *Barnes* v. *Brown*, 130 N. Y. 371; *Allegheny* v. *West. Penna. R. Co.*, 138 Pa. St. 375, 383; *Dillon* v. *Anderson*, 43 N. Y. 231; *Erickson* v. *Cass County*, 11 Nor. Dak. 494; *Gallagher* v. *Jones*, 129 U. S. 193; *Gal., H. & S. A. R. Co.* v. *Texas*, 210 U. S. 223; Gray's Limitation of Taxing Power, §§ 47a, 1317; *Hagerty* v. *State*, 55 Oh. St. 613; *Hartford* v. *West Middle District*, 45 Connecticut, 462; *Martin* v. *Dist.*

*of Col.*, 205 U. S. 135; *Nor. Pac. R. Co.* v. *Nor. Dak.*, 216 U. S. 579; *Norwood* v. *Baker*, 172 U. S. 269; *O'Brien* v. *Wheelock*, 184 U. S. 450; *Post. Tel. Co.* v. *Adams*, 155 U. S. 688, 697; *Shoemaker* v. *United States*, 147 U. S. 282; *Southern Gum Co.* v. *Laylin*, 66 Oh. St. 578; *State* v. *Guilbert*, 70 Oh. St. 229; *State* v. *Ferris*, 53 Oh. St. 314; *State Railroad Tax Cases*, 92 U. S. 575, 606; Sutherland on Damages, §§ 88, 89, 657, 692; *Walsh* v. *Barron*, 61 Oh. St. 15; *Warren* v. *Stoddart*, 105 U. S. 224; *West. Un. Tel. Co.* v. *Wright*, 185 Fed. Rep. 250, 257; *West. Un. Tel. Co.* v. *Mayer*, 28 Oh. St. 521; *Willcox* v. *Consol. Gas Co.*, 212 U. S. 19.

The tax in question is not a tax upon corporate franchises or privileges, as such, and cannot be saved on that theory. *Adler* v. *Whitbeck*, 44 Oh. St. 539; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107; *State* v. *Taylor*, 55 Oh. St. 61.

The tax is not an exercise of the police power for the purpose of meeting expenses incident to the regulation of railroads and other utilities. *Adler* v. *Whitbeck*, 44 Oh. St. 539; *Tennessee* v. *Whitworth*, 117 U. S. 129.

The value limitation, as laid down in the *Laylin* case, is for the protection of the individual and his property. Cooley's Const. Lim., 7th ed., p. 65; *Missouri Rate Cases*, 230 U. S. 474, 508; *Walsh* v. *Barron*, 61 Oh. St. 15.

There is an arbitrary and discriminatory classification. *Athens* v. *N. Y. &c. Tel. Co.*, 9 Pa. Dist. Rep. 253; *Barbier* v. *Connolly*, 113 U. S. 27; *Beckett* v. *Mayor*, 118 Georgia, 58; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232; *Cache County* v. *Jensen*, 21 Utah, 207; *Clark* v. *Titusville*, 184 U. S. 329; *Findlay* v. *Frye*, 51 Oh. St. 390; *Gulf &c. Ry. Co.* v. *Ellis*, 165 U. S. 150, 165; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Jaeger* v. *Burr*, 36 Oh. St. 164; *Juniata Limestone Co.* v. *Gagley*, 187 Pa. St. 193; *Kentucky R. R. Tax Cases*, 115 U. S. 321; *Magoun* v. *Illinois Savings Bank*, 170 U. S. 283; *Minneapolis Ry. Co.* v. *Beckwith*, 129 U. S. 26; *Peoria* v. *Gugenheim*, 61 Ill. App. 374; *Railroad Co.* v. *Connelly*, 10 Oh. St. 159; *Railroad Co.* v. *Poland*, 10

Nisi Prius (N. S.) 617; *State* v. *Heinnan*, 65 N. H. 103; *State* v. *Moore*, 113 Nor. Car. 697; *State* v. *Whitcorn*, 122 Wisconsin, 110; *Uppington* v. *Oviatt*, 24 Oh. St. 232; *West. Un. Tel. Co.* v. *Wright*, 185 Fed. Rep. 250; *Wyatt* v. *Ashbrook*, 154 Missouri, 375; Wyman, §§ 39, 53, 97, 100, 106.

The four per cent. tax, in the case of railroads, was imposed because of their being extensively engaged in interstate commerce, and was intended to be and is a burden upon interstate commerce, in violation of the commerce clause of the Federal Constitution. *Brimmer* v. *Rebman*, 138 U. S. 78; *Galveston &c. Ry. Co.* v. *Texas*, 210 U. S. 217; *McCulloch* v. *Maryland*, 4 Wheat. 316; *Mugler* v. *Kansas*, 123 U. S. 623; *Express Co.* v. *Minnesota*, 223 U. S. 335, 341.

Should it be claimed that the privilege of carrying on the business has a value, if considered as property, sufficient to meet the requirements of the value limitation in the *Laylin Case*, the result is double taxation. *Adams Exp. Co.* v. *Ohio*, 165 U. S. 194; *S. C.*, 166 U. S. 185.

The tax is based upon all gross earnings, excepting only such as are derived wholly from interstate business and business for the Federal Govern.oent. The failure to exclude also earnings from foreign commerce, in which appellants are engaged, renders act invalid under commerce clause. *Eidman* v. *Martinez*, 184 U. S. 578; *Hepburn* v. *Ellzey*, 2 Cranch, 445; *Lord* v. *Steamship Co.*, 102 U. S. 541; *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298, 302; *Veazie* v. *Moor*, 14 How. 568, 573.

The act is unconstitutional because of its effort to prevent judicial inquiry and force obedience to its terms and to administrative acts thereunder, irrespective of their validity. It thereby denies due process and equal protection. *Davidson* v. *New Orleans*, 96 U. S. 97; *Goldberg* v. *Stablemen's Union*, 86 Pac. Rep. 806; *Jones* v. *Davis*, 35 Oh. St. 474; *Pierce* v. *Stablemen's Union*, 103 Pac. Rep. 324; *Southern Gum Co.* v. *Laylin*, 66 Oh. St. 578; *State* v. *Jones*, 51 Oh. St. 492, 516; *Ex parte Young*, 209 U. S. 123.

*Mr. Frank Davis, Jr.*, and *Mr. Clarence D. Laylin*, with whom *Mr. Timothy S. Hogan*, Attorney General of the State of Ohio, was on the brief, for appellees:

It is necessary to examine into entire system of taxation of the State applicable to railroad companies in order to determine the validity and effect of the tax involved in the cases at bar. See *Gal., H. & S. An. R. R. Co.* v. *Texas*, 210 U. S. 217, 226; *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217; *U. S. Exp. Co.* v. *Minnesota*, 223 U. S. 323.

The contention is unfounded in law or in fact that under the constitution of Ohio, as construed by the Ohio Supreme Court, the legislature is without power to impose any privilege tax which is in excess of the value of the privilege taxed, and that inasmuch as the admitted facts show, it is alleged, the present tax upon appellants to wholly exceed such value, its exaction as to them violates the state constitution and amounts to confiscation and the taking of their property without due process of law. *Southern Gum Co.* v. *Laylin*, 66 Oh. St. 578; *Adler* v. *Whitbeck*, 44 Oh. St. 539; *Ashley* v. *Ryan*, 49 Oh. St. 504; 153 U. S. 436; *Express Company* v. *State*, 55 Oh. St. 69; *Hagerty* v. *State*, 55 Oh. St. 613; *State* v. *Ferris*, 53 Oh. St. 314; *Telegraph Company* v. *Mayer*, 28 Oh. St. 521.

For the nature of the privilege taxed by the law as involved in *Southern Gum Company* v. *Laylin*, and as to its being the privilege of corporate existence, as distinguished from the privilege of doing business as a corporation; and as to the tax being one on the franchise as distinguished from an excise occupation tax, see 1 Cooley on Taxation, 3d ed., pp. 31, 37; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107; *Southern Gum Co.* v. *Laylin*, 66 Oh. St. 578.

As to the element of natural monopoly, which is common to all the utilities taxed, and constitutes them such, see *Cin. Gas Light Co.* v. *State*, 18 Oh. St. 238, 243; *Munn* v. *Illinois*, 92 U. S. 113, 126; 1 Wyman on Pub. Serv. Corp. §§ 1, 50, 90; *Zanesville* v. *Gas Co.*, 47 Oh. St. 1, 33.

As to the burdens imposed upon the State and the public by the conduct of the business taxed see, *Adler* v. *Whitbeck*, 44 Oh. St. 539; *Express Co.* v. *Minnesota*, 223 U. S. 335; *Gal., H. & S. A. Ry. Co.* v. *Texas*, 210 U. S. 217.

As to corporate public utilities, the corporate franchise itself, see *Adams Exp. Co.* v. *Ohio*, 166 U. S. 185, 223; *Express Co.* v. *Minnesota*, 223 U. S. 335; *Gal., H. & S. A. Ry. Co.* v. *Texas*, 210 U. S. 217; *People* v. *Williams*, 200 N. Y. 93; *State* v. *C. & P. Ry. Co.*, 13 O. N. P. (N. S.) 671; *Ohio* v. *Traction Co.*, Franklin County Ct. of App., Dec. 6, 1913; *State* v. *Taylor*, 55 Oh. St. 61: *State Tax on Railway Gross Receipts*, 15 Wall. 284.

The so-called "value limitation" referred to in *Southern Gum Company* v. *Laylin*, 66 Oh. St. 578, was not intended to be and cannot be applied to the taxation of the privilege reached by the law involved in the cases at bar. *Adler* v. *Whitbeck*, 44 Oh. St. 539.

Even if the said "value limitation" could be applied generally to the imposition of the tax involved in the cases at bar, it cannot be invoked by an individual taxpayer to relieve him from the burden of the tax on a showing that his business is unprofitable. *Ashley* v. *Ryan*, 49 Oh. St. 504, 525, 526; *Baker* v. *Cincinnati*, 11 Oh. St. 549; *Cincinnati Gas Light Co.* v. *State*, 18 Oh. St. 238; Cooley's Const. Lim., 6th ed., 587, 588, 598, 606–613; 1 Cooley on Taxation, 3d ed., 3, 9, 31, 84, 181, 192, 225, 254, 390, 391, 684, 2 *Id.* 1153; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 108, 151; *Lander* v. *Burke*, 65 Oh. St. 532, 542; *Lewis* v. *State*, 69 Oh. St. 479; *Loan Asso.* v. *Topeka*, 20 Wall. 655, 664; *McCulloch* v. *Maryland*, 4 Wheat. 316, 428; *McNeil* v. *Hagerty*, 51 Oh. St. 255, 265; *Monnet* v. *State*, 45 Oh. St. 69; *Missouri Rate Cases*, 230 U. S. 474, 508; *Muller* v. *Oregon*, 208 U. S. 412; *Nor. Pac. R. R. Co.* v. *Nor. Dak.*, 216 U. S. 579; *Shotwell* v. *Moore*, 45 Oh. St. 646; *State* v. *Ferris*, 53 Oh. St. 314, 326; *State* v. *Guilbert*, 70 Oh. St.

253; *State Railroad Tax Cases*, 92 U. S. 575; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19.

Excise taxation in the pure sense is distinguished from taxation of franchises as such. See Century Dictionary; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 108, 151; *Missouri Rates Case*, 230 U. S. 474, 508; *Thomas* v. *United States*, 192 U. S. 372.

The Federal question sought to be raised by appellants depends upon their interpretation of *Southern Gum Company* v. *Laylin*, 66 Oh. St. 578; they do not and cannot claim under the Fourteenth Amendment to the Federal Constitution, independently of that decision. 1 Cooley on Taxation, 3d ed., 55; *Kelly* v. *Pittsburg*, 104 U. S. 78; *McCray* v. *United States*, 195 U. S. 27.

Equal protection of the laws of Ohio is not denied by the legislation involved in the cases at bar because of its alleged failure to apply to all "Public Utilities." *Am. Sugar Co.* v. *Louisiana*, 179 U. S. 89; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232; *Brown-Foreman Co.* v. *Kentucky*, 217 U. S. 563; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Kentucky R. R. Tax Cases*, 116 U. S. 321; *Magoun* v. *Illinois Savings Bank*, 170 U. S. 283; *Munn* v. *Illinois*, 94 U. S. 113; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114; *State ex rel.* v. *Ferris*, 53 Oh. St. 314, 341; *Cargill Co.* v. *Minnesota*, 180 U. S. 452.

The Ohio law does not deny the equal protection of the laws of the State because of the differences in the rates imposed by it upon different public utilities. *Kidd* v. *Alabama*, 188 U. S. 730; *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339; *Railroad Co.* v. *Poland*, 10 O. N. P. (N. S.) 617; *Savannah &c. I. Ry.* v. *Savannah*, 198 U. S. 392.

The act does not deny the equal protection of the laws of Ohio because of its failure to classify railroads for excise tax purposes according to any alleged notorious

differences among them. *Blackstone* v. *Miller*, 188 U. S. 189; 1 Cooley on Taxation, 3d ed., 390, 391; *Muller* v. *Oregon*, 208 U. S. 412.

The readjustment of rates of excise taxation made by the Ohio legislature following the decision in *Galveston, Harrisburg and San Antonio Railroad Company* v. *Texas*, 210 U. S. 217, does not disclose an intention indirectly to burden or to continue to burden interstate commerce as such. 1 Cooley on Taxation, 3d ed., 41, 411; *People* v. *Brooklyn*, 4 N. Y. 419, 426, 427; *Ratterman* v. *Telegraph Co.*, 127 U. S. 411.

The tax imposed by the Ohio law is not in effect an additional tax upon property. *Adler* v. *Whitbeck*, 44 Oh. St. 539; *Anderson* v. *Brewster*, 44 Oh. St. 576; *Ashley* v. *Ryan*, 49 Oh. St. 504; *Express Co.* v. *State*, 55 Oh. St. 69; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107; *State* v. *Ferris*, 53 Oh. St. 314; *Telegraph Co.* v. *Mayer*, 28 Oh. St. 521.

Foreign commerce is not burdened by the act. *Ratterman* v. *West. Un. Tel. Co.*, 127 U. S. 424, 425.

The alleged coercive sections of the Ohio law properly interpreted violate no constitutional limitation; but even if regarded as unconstitutional, their invalidity does not affect the substantive provisions of the act; nor can their validity be questioned in these cases. *Flint* v. *Stone-Tracy Co.*, 200 U. S. 177; *Minnesota Rate Cases*, 230 U. S. 352; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 53, 54; *Ex parte Young*, 209 U. S. 123.

MR. JUSTICE PITNEY, after making the foregoing statement, delivered the opinion of the court.

These two cases depend upon practically identical facts, and present the same questions of law.

The Federal jurisdiction arose because of the Federal questions presented in the record, and did not depend upon diversity of citizenship; and it extends of course to

the determination of all the questions presented, irrespective of the disposition that may be made of the Federal questions. *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175, 191; *Michigan Central R. Co.* v. *Vreeland*, 227 U. S. 59, 63.

The right to invoke the equity jurisdiction is clear; for the Act specifically makes the tax a lien upon the real estate of appellants, from the cloud of which they sought to free it by the bringing of these actions (§ 117 of Act; § 5506, Gen. Code); and the bills alleged threatened irreparable injury through the enforcement of the penalties and coercive features of the Act. *Shelton* v. *Platt*, 139 U. S. 591, 598; *Ex parte Young*, 209 U. S. 123.

The following are the questions to be disposed of:

First, it is insisted by appellants that under the state constitution, as construed by the Ohio Supreme Court in *Southern Gum Co.* v. *Laylin*, 66 Oh. St. 578, the legislature is without power to impose a privilege tax which is in excess of the value of the privilege; that the admitted facts show the present tax upon appellants respectively to be in excess of such value; and that therefore as to them its exaction violates the state constitution, and amounts to confiscation, and a taking of property without due process of law.

As to the facts upon which this contention is based, the bill of complaint of the Marietta, Columbus & Cleveland Railroad Company shows that the tax charged against it for the year 1911 amounts to $2,301.24; that the capital of the company is all, or practically all, invested in its railroad; that this investment was and is a reasonable and proper one; that due care and prudence have been used in the construction, maintenance and operation of the property and the conduct of the business; that the greatest economy has been and is being practiced in the effort to make the railroad yield a fair return upon the investment; but that notwithstanding these efforts it has

never been able to earn, and is not now able to earn, from interstate or intrastate business, or both combined, after paying necessary and proper expenses, including taxes other than the excise tax, a return on the investment in its railroad, or on the value thereof, equal to the current rate of return on legitimate high-grade investments at all times readily available in the market; nor have its intrastate earnings, after deducting operating expenses properly attributable thereto, been sufficient to yield a return on that portion of its investment properly attributable to intrastate operations, equal to the current rate of return on legitimate high-grade investments; that, on the contrary, the gross earnings have not been and are not sufficient to pay actual operating expenses, and that this condition will continue to exist during the year which the excise tax is intended to cover.

The bill of complaint of the Ohio River and Western Railway Company contains similar averments, except as to its inability to pay actual operating expenses. Its tax amounts to $6,653.60.

The case referred to, *Southern Gum Co.* v. *Laylin*, 66 Oh. St. 578, dealt with an Act of April 11, 1902, known as the Willis Law. The court held it to be an excise or franchise tax, not a property tax, and therefore not subject to the express limitations imposed by the state constitution upon taxes of the latter kind, but only to such limitations as were to be implied from certain other provisions of the constitution, respecting which the court said (p. 594): "The constitution was established to 'promote our common welfare.' Preamble to the constitution. Government is instituted for the equal protection and benefit of the people. Section two of the bill of rights. Private property shall ever be held inviolate, but subservient to the public welfare. Section nineteen of the bill of rights. These provisions of the constitution are implied limitations upon the power of taxation of privileges

and franchises, and limit such taxation to the reasonable value of the privilege or franchise conferred originally, or to its continued value from year to year. *Ashley* v. *Ryan*, 49 Ohio St. 504; *State ex rel.* v. *Ferris*, 53 Ohio St. 314; and *Hagerty* v. *State*, 55 Ohio St. 613, are examples of taxing the privilege or franchise conferred; while *Telegraph Company* v. *Mayer*, 28 Ohio St. 521, and *Express Company* v. *State*, 55 Ohio St. 69, are examples of taxing the continued value of the existing privilege or franchise from year to year. These limitations prevent confiscation and oppression under the guise of taxation, and the power of such taxation cannot extend beyond what is for the common or public welfare, and the equal protection and benefit of the people; but the ascertaining and fixing of such values rests largely in the general assembly, but finally in the courts."

This proposition is carried into the syllabus, which, under the rules of practice of the Supreme Court, is to be prepared by the judge assigned to prepare the opinion, is to be confined to the points of law arising from the facts of the cause that have been determined by the court, is to be submitted to the judges concurring therein for revisal before its publication, and is to be inserted in the book of reports.

An examination of the state decisions cited in the *Laylin Case*, with others referred to in the opinion of the District Court and in the briefs of counsel, convinces us that the District Court was correct in its conclusion that the state court, in the *Laylin Case*, dealt with a general law and its operation on all corporations of given classes throughout the State, and not with its effect upon specific financially weak corporations; that it was not intended to hold that the courts as final arbiters might overthrow a law imposing a tax on privileges and franchises merely because in isolated cases such law might impose a hardship, but only that those excise laws whose general operation is confiscatory and oppressive are unconstitutional.

Nor do we think that from the facts of the present case it is to be inferred that the franchises of plaintiffs in error are valueless merely because it appears that the present earnings of the railroads are not sufficient to pay more than can be derived from legitimate high-grade investment securities that are readily available on the market, or (in the case of one of the roads), are not even sufficient to pay operating expenses. Upon this point we are content to refer to, without repeating, the language employed by Mr. Justice Miller, speaking for this court in *State Railroad Tax Cases*, 92 U. S. 575, 606.

Secondly, it is contended that the Act arbitrarily discriminates against plaintiffs in error and other railroad companies in that (a), it does not include all other public utilities carrying on business within the State; those omitted, as is said, being grain elevators, stock-yards, ferries, bridge companies, and inn-keepers; and (b), the law does not operate uniformly among the utilities that are taxed, since, on electric light, gas, natural gas, water works, telephone, messenger or signal, union depot, heating, coaling, and water transportation companies, the tax amounts to 1.2% of gross intrastate receipts, as to suburban and interurban railroads it is fixed at 1.2% of gross intrastate earnings, and on express and telegraph companies, it is 2%; while on railroads, including plaintiffs in error, it is 4% of such earnings, and the same on pipe line companies.

Both of these contentions turn upon the familiar question of classification, concerning which so much has been written. We agree with the court below that whether the question be considered in view of the uniformity and equality provisions of the Ohio constitution, or of the "equal protection" clause of the Fourteenth Amendment, the result is the same; it cannot be said that the classification rests upon no reasonable and sufficient basis of distinction. *State* v. *Guilbert*, 70 Oh. St. 229, 253; *Kentucky*

*Railroad Tax Cases*, 115 U. S. 321, 337; *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 121 *et seq.*

In the third place, it is insisted that the act, as applied to railroads, is a burden upon their foreign commerce.

This contention is rested in part upon the language of §§ 83 and 88, which in terms provide for ascertaining the earnings of the railroad "from whatever source derived, for business done within this State, excluding therefrom all earnings derived wholly from interstate business or business done for the Federal government." This, it is argued, has the effect of imposing a tax with respect to the gross receipts from foreign commerce, because such commerce is not expressly excepted. Section 97, however, indicates an intent to take into consideration for the purpose of measuring the excise tax only the earnings upon intrastate business, and it seems clear enough that in the former sections the word "interstate" was used as meaning "not intrastate," rather than in its technically correct signification. Certainly, in the absence of a construction by the state court of last resort to the effect that the receipts from foreign commerce are to be included, and without any attempt on the part of the taxing authorities to include them, the Federal courts ought not to place a construction upon the act that would render it unconstitutional.

Fourthly, it is contended that the history of the legislation upon the subject shows that the act of May 31, 1911, was really contrived to impose upon the railroad companies a franchise tax proportionate to their interstate commerce, and that such is its actual as well as intended effect.

It is said that the present act is a reënactment, without material change so far as present purposes are concerned, of an act of March 10, 1910; that prior to the latter act

a law known as the Cole Law was in force, under which each railroad was compelled to pay a tax equal to one per centum of its entire gross earnings, computed by multiplying the average gross earnings per mile over the entire system by the number of miles in Ohio; that this act was obnoxious to the "commerce clause" of the Federal Constitution, for the reasons that entered into the decision of this court in *Galveston, Harrisburg &c. Ry. Co.* v. *Texas*, 210 U. S. 217; that after the decision of this case in May, 1908, it was anticipated that the Cole Law would probably be held unconstitutional (as it has since been held by an inferior state court in Ohio), and so the Legislature contrived the act of March 10, 1910, for the purpose of imposing a tax upon the railroads as heavy as that imposed by the Cole Law, while avoiding the form of that enactment; and that for this reason the act of March 10, 1910, increased the percentages in accordance with which the taxes were to be severally determined as follows: Railroads and pipe line companies from 1 to 4 per cent.; express and telegraph companies from 1 to 2 per cent.; all other utilities from 1 to 1 1–5 per cent.; but that instead of taking all the gross earnings, the new percentages were to be applied only to intrastate earnings. It is contended that the increase in the percentages as to railroad and pipe line companies was due to the fact that it was conceived that about three-fourths of their business was interstate, and that therefore a tax of 4% on the intrastate earnings would be about equal to a tax of 1% on the total; in other words, that the tax rate was increased fourfold because such utilities were engaged in interstate commerce.

The tax is, however, in substance as well as in form, an excise or privilege tax. Its reasonableness, unless some Federal right be violated, is within the discretion of the state legislature. We have seen that the classification adopted cannot be deemed illusory; that is, there is no

apparent violation of the equality provisions of the state constitution or of the "equal protection" clause of the Fourteenth Amendment, although railroad and pipe line companies are required to pay at the rate of four per cent. of the annual intrastate earnings, while other public service corporations pay a less percentage. It is, of course, entirely settled that a State cannot, consistently with the Federal control of interstate commerce, lay such taxes, either upon property rights or upon franchises or privileges, as in effect to burden such commerce. But the line is not always easily drawn, as recent cases sufficiently show. *Galveston, Harrisburg &c. Ry. Co.* v. *Texas*, 210 U. S. 217, 225, 229; *United States Express Co.* v. *Minnesota*, 223 U. S. 335, 344; *Williams* v. *Talladega*, 226 U. S. 404, 416; *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 82.

The present act does not on its face manifest a purpose to interfere with interstate commerce, and we are unable to accept the historical facts alluded to as sufficient evidence of a sinister purpose, such as would justify this court in striking down the law. We could not do this without in effect denouncing the legislature of the State as guilty of a conscious attempt to evade the obligations of the Federal Constitution. Assuming the law was changed in 1910 because of a fear that the Cole Law would be held unconstitutional, the mere fact that, while excluding interstate earnings from the multiplicand, the multiplier was increased, is not of itself deemed sufficient evidence of an unlawful effort to burden a privilege that is not a proper subject of state taxation.

Fifthly, it is contended that the act is in effect a double tax upon property, and hence lacking in the uniformity required by the state constitution. But, as was pointed out by the District Court, the exaction of four per cent. of the gross intrastate earnings is not a property tax but an excise tax, whose amount is fixed and measured by such earnings; and double taxation in a legal sense does not

exist unless the double tax is levied upon the same property within the same jurisdiction. Plaintiffs in error pay one tax with respect to property, another with respect to the privilege or occupation; hence the taxation is not double. *Bradley* v. *Bauder*, 36 Oh. St. 28, 35; *Southern Gum Co.* v. *Laylin*, 66 Oh. St. 578, 596.

The so-called double tax is also laid hold of as a ground for the contention that there is a denial of equal protection within the meaning of the Fourteenth Amendment. This, however, is but another form of the objection to the classification, which has already been disposed of.

Finally, it is contended that the act is unconstitutional because of the severity of the penalties imposed for withholding the tax. But these actions do not involve any present attempt to enforce the penalties; and the act contains a section (160) which in terms declares: "The sections of this act, and every part of such sections, are hereby declared to be independent sections and parts of sections, and the holding of any section or part thereof to be void or ineffective shall not affect any other section or part thereof." The penalty clauses, if themselves unconstitutional, are severable, and there is therefore no present occasion to pass upon their validity. *Ex parte Young*, 209 U. S. 123; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53, 54; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 177; *Grand Trunk Ry.* v. *Michigan Ry. Comm.*, 231 U. S. 457, 473.

*Decrees affirmed.*

MR. JUSTICE DAY took no part in the decision of these cases.